Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 92–45)

FOREIGN CURRENCIES

DAILY RATES FOR COUNTRIES NOT ON QUARTERLY LIST FOR APRIL 1992

The Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, has certified buying rates for the dates and foreign countries shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to Part 159, Subpart C, Customs Regulations (19 CFR 159, Subpart C).

Holiday: None.

Greece drachma:

April 1, 1992	$0.005210
April 2, 1992	.005218
April 3, 1992	.005280
April 6, 1992	.005259
April 7, 1992	.005245
April 8, 1992	.005237
April 9, 1992	.005265
April 10, 1992	.005216
April 13, 1992	.005173
April 14, 1992	.005199
April 15, 1992	.005153
April 16, 1992	.005132
April 17, 1992	.005133
April 20, 1992	.005116
April 21, 1992	.005119
April 22, 1992	.005145
April 23, 1992	.005152
April 24, 1992	.005184
April 27, 1992	.005171
April 28, 1992	.005165
April 29, 1992	.005163
April 30, 1992	.005165

FOREIGN CURRENCIES—Daily rates for countries not on quarterly list for April 1992 (continued):

South Korea won:

April 1, 1992	$0.001283
April 2, 1992	.001283
April 3, 1992	.001283
April 6, 1992	.001282
April 7, 1992	.001280
April 8, 1992	.001294
April 9, 1992	.001277
April 10, 1992	.001276
April 13, 1992	.001275
April 14, 1992	.001274
April 15, 1992	.001274
April 16, 1992	.001274
April 17, 1992	.001275
April 20, 1992	.001278
April 21, 1992	.001278
April 22, 1992	.001276
April 23, 1992	.001274
April 24, 1992	.001275
April 27, 1992	.001277
April 28, 1992	.001276
April 29, 1992	.001276
April 30, 1992	.001276

Taiwan N.T. dollar:

April 1, 1992	$0.039293
April 2, 1992	.039216
April 3, 1992	N/A
April 6, 1992	.039277
April 7, 1992	.039362
April 8, 1992	.039628
April 9, 1992	.039580
April 10, 1992	.039527
April 13, 1992	.039526
April 14, 1992	.039513
April 15, 1992	.039596
April 16, 1992	.039541
April 17, 1992	.039534
April 20, 1992	N/A
April 21, 1992	.039514
April 22, 1992	.039588
April 23, 1992	.039584
April 24, 1992	.039573
April 27, 1992	.039573
April 28, 1992	.039573
April 29, 1992	.039626
April 30, 1992	.039649

(LIQ-03-01 S:NISD CIE)

Dated: May 1, 1992.

GERRI WECHSLER,
Acting Chief,
Customs Information Exchange.

(T.D. 92–46)

FOREIGN CURRENCIES

Variances From Quarterly Rates for April 1992

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to 31 U.S.C. 5151, and reflect variances of 5 per centum or more from the quarterly rates published in Treasury Decision 92–35 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Holiday: None.

Australia dollar:	
April 1, 1992	$0.766600
Austria schilling:	
April 1, 1992	$0.086022
Belgium franc:	
April 1, 1992	$0.029412
Canada dollar:	
April 1, 1992	$0.839278
China, P.R., renminbi yuan:	
April 1, 1992	$0.182442
Denmark krone:	
April 1, 1992	$0.156140
Finland markka:	
April 1, 1992	$0.221680
France franc:	
April 1, 1992	$0.178619
Germany deutsche mark:	
April 1, 1992	$0.605694
Hong Kong dollar:	
April 1, 1992	$0.129182
April 20, 1992	N/A
India rupee:	
April 1, 1992	$0.034483
April 20, 1992	N/A
Ireland pound:	
April 1, 1992	$1.612000

FOREIGN CURRENCIES—Variances from quarterly rates for April 1992 (continued):

Italy lira:	
April 1, 1992	$0.000803
Japan yen:	
April 1, 1992	$0.007435
Malaysia dollar:	
April 1, 1992	$0.386847
April 20, 1992	N/A
Netherlands guilder:	
April 1, 1992	$0.537981
New Zealand dollar:	
April 1, 1992	$0.545000
Norway krone:	
April 1, 1992	$0.154261
Portugal escudo:	
April 1, 1992	$0.007010
Singapore dollar:	
April 1, 1992	$0.602047
April 20, 1992	N/A
South Africa, Republic of, rand:	
April 1, 1992	$0.347826
April 17, 1992	N/A
April 20, 1992	N/A
Spain peseta:	
April 1, 1992	$0.009562
Sri Lanka rupee:	
April 1, 1992	$0.023195
April 3, 1992	N/A
April 6, 1992	N/A
April 10, 1992	N/A
April 13, 1992	N/A
April 14, 1992	N/A
April 15, 1992	.023120
April 16, 1992	N/A
April 17, 1992	N/A
April 20, 1992	N/A
April 22, 1992	.023056
April 23, 1992	N/A
April 24, 1992	N/A
April 27, 1992	N/A
April 28, 1992	N/A
April 29, 1992	N/A
April 30, 1992	N/A

FOREIGN CURRENCIES—Variances from quarterly rates for April 1992 (continued):

Sweden krona:	
April 1, 1992	$0.166861
Switzerland franc:	
April 1, 1992	$0.662691
Thailand baht (tical):	
April 1, 1992	$0.039032
April 17, 1992	N/A
April 20, 1992	N/A
April 28, 1992	.046200
United Kingdom pound:	
April 1, 1992	$1.726500

(LIQ-03-01 S:NISD CIE)
Dated: May 1, 1992

GERRI WECHSLER,
Acting Chief,
Customs Information Exchange.

U.S. Customs Service

General Notice

COUNTRY OF ORIGIN MARKING; PRESERVED MUSHROOMS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUBJECT: Section 1907(b), Omnibus Trade and Competitiveness Act of 1988.

SUMMARY: This Notice is published to remind importers and interested persons of the required country of origin marking pursuant to section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), for imported preserved mushrooms.

Section 1970(b) of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, provides:

> MARKING OF CONTAINERS OF IMPORTED MUSHROOMS.–Imported preserved mushrooms shall not be considered to be in compliance with section 304 of the Tariff Act of 1930 (19 U.S.C. 1304) or any other law relating to the marking of imported articles unless the containers thereof indicate in English the country in which the mushrooms were grown.

While this provision has not been codified, it nonetheless states the applicable marking requirement for preserved mushrooms.

It recently has come to Customs attention that preserved mushrooms continue to be imported without the marking required under section 1907(b). Importers are advised that the country of growth is the country of origin of preserved mushrooms for marking purposes. Subsequent packing or preserving is not marking purposes. Subsequent packing or preserving is not sufficient to change the country of origin, and the term "product of" may only be used to refer to the country in which the mushrooms grown. *See* HQ 734281 (February 13, 1992) (for mushrooms grown in China and packed in Hong, the marking "Product of Hong Kong/(Grown in China)" is not acceptable; the term "product of" may be used only to designate country of origin).

Customs will continue to closely monitor importations of preserved mushrooms for compliance with the marking prescribed under by section 1907(b) of the 1988 Trade Act. To be in compliance, the country in which the mushrooms are grown must be clearly indicated. Any of the

following phrases may be used: "grown in", "product of", or simply the name of the country where the mushrooms are grown. If reference is made on the container to a geographic location other than the country of origin, the words "grown in" or "product of "are required. *See* 19 CFR 134.46.

Dated: May 4, 1992.

SAMUEL H. BANKS,
Assistant Commissioner,
Commercial Operations.

U.S. Court of Appeals for the Federal Circuit

NORCAL/CROSETTI FOODS, INC., PATTERSON FROZEN FOODS, INC., AND RICHARD A. SHAW, INC., PLAINTIFFS-APPELLEES *v.* UNITED STATES, U.S. CUSTOMS SERVICE, U.S. DEPARTMENT OF THE TREASURY, NICHOLAS BRADY, JOHN DURANT, AND HOWARD B. FOX, DEFENDANTS-APPELLANTS

Appeal No. 91-1295

(Decided May 4, 1992)

Robert Ted Parker, Titchell, Maltzman, Mark, Bass, Ohleyer & Mishel, of San Francisco, California, argued for plaintiffs-appellees. With him on the brief was *Richard D. Maltzman*.

Barbara Epstein, Commercial Litigation Branch, Department of Justice, of New York, New York, argued for defendants-appellants. With her on the brief were *Stuart M. Gerson*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office. Also on the brief was *Claib L. Cook*, Offices of General Counsel, U.S. Customs Service, of counsel.

Irwin P. Altschuler, *Donald S. Stein* and *Claudia G. Pasche*, Brownstein, Zeidman & Schomer, of Washington, D.C., were on the brief for Amicus Curiae, Covemex, S.A. De C.V.

Paul C. Rosenthal and *Michael R. Kershow*, Collier, Shannon & Scott, of Washington, D.C., were on the brief for Amicus Curiae, The National Juice Products Association. Also on the brief were *David C.G. Kerr* and *Ansley Watson, Jr.*, MacFarlane, Ferguson, Allison & Kelly, of Tampa, Florida.

Gary Jay Kushner, *Timothy C. Stanceu* and *David W. Phillips*, Hogan & Hartson, of Washington, D.C., were on the brief for Amicus Curiae, The Grocery Manufacturers of America, Inc.

Appealed from: U.S. Court of International Trade.
Judge MUSGRAVE.

Before NIES, *Chief Judge*, NEWMAN and MAYER, *Circuit Judges*.

MAYER, *Circuit Judge*.

The government appeals the judgment of the United States Court of International Trade, 758 F. Supp. 729 (Ct. Int'l Trade 1991), finding subject matter jurisdiction and compelling the United States Customs Service to withdraw a ruling letter approving certain practices of marking imported frozen produce. We reverse and remand with instructions to dismiss.

BACKGROUND

Appellees, Norcal/Crosetti Foods, Inc., Patterson Frozen Foods, Inc., and Richard A. Shaw, Inc. (collectively Norcal), are California-based frozen produce packaging companies. On May 9, 1988, Norcal filed a request with the United States Customs Service (Customs) seeking a determination that certain competitors' packages of imported frozen

produce do not comply with the "conspicuous" marking requirements of 19 U.S.C. § 1304[1] and its implementing regulation 19 C.F.R. § 134[2]. More specifically, Norcal requested a ruling requiring that

> packages of imported frozen produce intended for sale to the consumer bear the name of the country of origin on the front panel of the package. * * * [and] that the lettering of such markings should be at least as large as the lettering of the product description and/or that the marking appear in a type or color vividly contrasting with the rest of the front panel.

Accompanying the request were samples of imported frozen produce packages with country of origin markings on the rear, side, or front panel of the package.

Customs responded by issuing a ruling letter stating that the country of origin marking on the submitted samples was "conspicuous" within the meaning of section 1304 and 19 C.F.R. § 134.41(b), and that country of origin markings need not appear in the manner suggested by Norcal. Dissatisfied with this determination, Norcal filed suit against Customs in the Northern District of California alleging that by misinterpreting section 1304, Customs failed to ensure proper marking. By stipulation, the case was transferred to the Court of International Trade on August 30, 1989, pursuant to 28 U.S.C. § 1631 (1988). The government expressly reserved its jurisdictional defenses.

On November 8, 1989, the government moved to dismiss the case for lack of jurisdiction, which motion the court denied. 731 F. Supp. 510 (Ct. Int'l Trade 1990). The parties subsequently cross-moved for summary judgment on the merits. The court granted summary judgment for Norcal, repeating its conclusion that it had subject matter jurisdiction and holding that the country of origin of imported frozen produce must, at minimum, be marked on the front or most prominent panel of the package in order to be "conspicuous" within the meaning of section 1304. 758 F. Supp. at 741. The court ordered Customs to withdraw all prior decisions or rulings not in accordance with its decision, and to issue a new ruling letter reflecting the court's interpretation of the statute within 90 days. The government appealed.

---

[1] 19 U.S.C. § 1304 (1988) provides:

> **Marking of imported articles and containers**
>
> **(a) Marking of articles**
>
> Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

[2] 19 C.F.R. § 134.41 (1991) provides:

> **Methods and manner of marking.**
>
> (b) *Degree of permanence and visibility.* The degree of permanence should be at least sufficient to insure that in any reasonably foreseeable circumstance, the marking shall remain on the article (or its container) until it reaches the ultimate purchaser unless it is deliberately removed. The marking must survive normal distribution and store handling. The ultimate purchaser in the United States must be able to find the marking easily and read it without strain.

Discussion

Pursuant to 28 U.S.C. § 1292(c)(1) (1988), this court has jurisdiction over an appeal from interlocutory orders described in section 1292(a), which include orders granting injunctive relief. In its original complaint, Norcal explicitly requested an injunction as a form of relief. The trial court's amended judgment does not expressly characterize the relief as injunctive, but its characterization is not controlling. The true nature of the trial court's order is what matters:

> [N]otwithstanding the court's refusal to style it as such. * * * "[f]or purposes of appeal, an injunction is an order requiring a party to do or refrain from doing something that is an integral part of the very matter in litigation * * *." J. Moore, J. Lucas & K. Sinclair, *Moore's Federal Practice*, paragraph 65.21 (1989).

NTN Bearing Corp. of America v. United States, 892 F.2d 1004, 1005, 1006 (Fed. Cir. 1989). In its amended judgment, the trial court announces a detailed interpretation of section 1304 imposing specific, novel requirements for marking imported frozen produce. It then orders Customs to revoke all prior decisions and rulings not in accordance with its interpretation, and to submit a consistent ruling letter within 90 days. 758 F. Supp. at 742. Such relief falls squarely within the bounds of section 1292(c) as contemplated by *NTN Bearing*.

The government contends that the Court of International Trade lacked jurisdiction over Norcal's appeal. It is a "well-established principle that federal courts * * * are courts of limited jurisdiction marked out by Congress." *Aldinger v. Howard*, 427 U.S. 1, 15 (1976). The jurisdiction of the Court of International Trade is therefore "limited to those subjects encompassed within a statutory grant of jurisdiction." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701 (1982); *see also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988). The statute defining the general jurisdiction of the Court of International Trade is 28 U.S.C. § 1581 (1988). *National Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1555 (Fed. Cir. 1988). In the part relevant here, section 1581 provides:

> (b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930 [now codified as amended at 19 U.S.C. § 1516 (1988)] * * *.
>
> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)–(h) of this section * * *, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for — * * *
>
>> (4) administration and enforcement with respect to the matters referred to in * * * subsections (a)–(h) of this section. * * *

Subsections (a)-(h) delineate particular laws over which the Court of International Trade may assert jurisdiction. *National Corn Growers*, 840 F.2d at 1555.

Subsection (b) provides exclusive jurisdiction over civil actions commenced under 19 U.S.C. § 1516 (1988). Section 1516 is a detailed framework by which domestic manufacturers, producers, wholesalers, unions, and trade associations can file petitions challenging Customs' determinations on the appraised value, the classification, or rate of duty imposed upon designated imported merchandise. The framework allows domestic parties access to classification and rate of duty information on designated merchandise, 19 U.S.C. § 1516(a)(1) (1988), requires publication of contested determinations, *id.* § 1516(c), and provides a right for importers to participate in the administrative proceedings and to be parties in interest in proceedings before the Court of International Trade, *id.* § 1516(e); 19 C.F.R. § 175.21(a) (1991). Subsection 1516(b) also provides a specific time limitation when revised determinations must be applied to imported goods.

Subsection 1581(i) is a "catch-all" provision, allowing the trial court to take jurisdiction over designated causes of action founded on other provisions of law. *See National Corn Growers*, 840 F.2d at 1556, 1557. But unambiguous precedents of this court make clear that its scope is strictly limited: "Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 *is or could have been available*, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987) (emphasis added); *accord National Corn Growers*, 840 F.2d at 1557. This preserves the congressionally mandated procedures and safeguards, *see e.g.*, 19 U.S.C. § 1516 (1988), provided in the other subsections, *see National Corn Growers*, 840 F.2d at 1555, 1556, absent which litigants could ignore the precepts of subsections (a)-(h) and immediately file suit in the Court of International Trade under subsection (i). *Id.* at 1556.

After rejecting Norcal's suggestion of jurisdiction under subsection 1581(h), the trial court asserts jurisdiction pursuant to subsection 1581(i)(4). *See* 758 F. Supp. at 733, 734. The assertion is grounded in the court's supposition that Norcal could not have secured relief under section 1516, thus precluding jurisdiction under subsection 1581(b):

> Section 1516 is specifically restricted to petitions by interested parties to challenge "the appraised value, the classification, or rate of duty [of imported goods]." 19 U.S.C. § 1516. If Norcal had come to this Court alleging that jurisdiction was available under § 1516, the government would surely (and more convincingly) have challenged the appropriateness of shoe-horning an action concerning the proper *marking* of merchandise into a jurisdictional statute concerned with appraised value, classification or rate of duty. * * * Norcal can proceed under 28 U.S.C. § 1581(i)(4) because its claim would be barred under any other portion of § 1581. [*Id.* at 733 (citation omitted).]

We disagree. The essence of the relief requested by Norcal is a ruling announcing a new interpretation of section 1304, dictating specific marking requirements for frozen produce. Such relief can result from a section 1516 classification and rate of duty challenge. 19 U.S.C. § 1304(f) (1988) provides:

> **Additional duties for failure to mark**
>
> If at the time of importation any article (or its container, as provided in subsection (b) of this section) is not marked in accordance with the requirements of this section, and if such article is not exported or destroyed or the article (or its container, as provided in subsection (b) of this section) marked after importation in accordance with the requirements of this section * * * there shall be levied, collected, and paid upon such article a duty of 10 per centum ad valorem, which shall be deemed to have accrued at the time of importation, shall not be construed to be penal, and shall not be remitted wholly or in part nor shall payment thereof be avoidable for any cause. Such duty shall be levied, collected, and paid in addition to any other duty imposed by law and whether or not the article is exempt from the payment of ordinary customs duties. * * *

Norcal alleges that certain imported frozen produce is not marked as required by section 1304. In accordance with subsection 1304(f), improperly marked goods are subject to a 10 percent ad valorem duty. Having determined the subject frozen produce fully complied with section 1304, Customs failed to levy such duty. Accordingly, Norcal *could have* petitioned Customs challenging the rate of duty of the imported produce under section 1516. *See Diamond Match Co. v. United States*, 49 CCPA 52, 53–56 (1962) (classification and rate of duty, as determined by country of origin marking, challenged under section 516(b) of the Tariff Act of 1930, as amended); *Bradford Co. v. American Lithographic Co.*, 12 Ct. Cust. 318, 324, 325 (1924) (classification and rate of duty, as determined by country of origin marking, challenged under section 516(b) of the Tariff Act of 1922). In addressing Norcal's petition, Customs would necessarily scrutinize its interpretation of section 1304 as applied to imported frozen produce. Ultimately, exhaustion of the petition process would lead to the availability of review in the Court of International Trade under subsection 1581(b), *see* 28 U.S.C. § 2637(b) (1988); *National Corn Growers*, 840 F.2d at 1556, n. *, after exhaustion of section 1516's administrative remedies.

Norcal argues that section 1516 is simply inadequate because

> the process takes too long, given the economic background, for the meaningless gesture of taking product by product and asking Customs to change views so recently expressed in the ruling. * * * Norcal processors could care less about the "appraised value, classification or rate of duty" of imported frozen produce. Those issues are not going to save the California processing industry.

But Congress has provided a specific, detailed framework for domestic parties to challenge Customs' actions. With their built-in safeguards and limitations, these procedures are the proper remedies wherever

available and are not to be dismissed because they are inconvenient. *See National Corn Growers*, 840 F.2d at 1556. Accordingly, Norcal having failed to exhaust its administrative remedies under section 1516, jurisdiction in the Court of International Trade is lacking. That being the case, of course, its decision on the merits is void.

Conclusion

Accordingly, the judgment of the Court of International Trade is reversed, and the case is remanded with instructions that the court dismiss the complaint for lack of jurisdiction.

Costs

Norcal shall bear the costs of this appeal.

REVERSED AND REMANDED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 92–57)

BORUSAN HOLDING A.S. AND BORUSAN IHRACAT ITHALAT VE DAGITIM A.S., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, WHEATLAND TUBE CO., DEFENDANT-INTERVENOR

Court No. 90–11–00602

[Plaintiffs' objections to the Department of Commerce, International Trade Administration's final results of partial remand and motion for second remand granted. Remanded to the Department of Commerce, International Trade Administration.]

(Dated April 23, 1992)

Dickstein, Shapiro & Morin, (*Arthur J. Lafave III, Jeffrey W. Brennan*), for plaintiffs.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Vanessa P. Sciarra*), *D. Michael Kaye,* Of Counsel, Attorney-Advisor, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Schagrin Associates, (*Mark C. Del Bianco*), for defendant-intervenor.

MEMORANDUM OPINION

GOLDBERG, *Judge:* This action comes before this court on plaintiffs' objections to the Department of Commerce, International Trade Administration's final results of partial remand and motion for second remand. The court finds that the International Trade Administration's final results of partial remand are not based upon substantial evidence or in accordance with law, and grants plaintiffs' request for a second remand.

BACKGROUND

On July 16, 1985, the Standard Pipe and Tube Committee and the Line Pipe Subcommittee of the Committee on Pipe and Tube Imports[1] filed antidumping and countervailing duty petitions. They alleged that welded carbon steel pipe and tube imports from Turkey were being sold in the United States at less than fair value, and were being subsidized by the Turkish government.

After investigation by the Department of Commerce, International Trade Administration ("ITA") and the International Trade Commission, the ITA issued a countervailing duty order with respect to the im-

[1] The Wheatland Tube Company is a member of the Committee on Pipe and Tube Imports,' and is the defendant-intervenor in this action.

ported merchandise on March 7, 1986. *See Certain Welded Carbon Steel Pipe and Tube Products from Turkey*, 51 Fed. Reg. 7984 (1986). On May 15, 1986, the ITA also issued an antidumping duty order. *See Welded Carbon Steel Pipe and Tube Products from Turkey*, 51 Fed. Reg. 17784 (1986).

After issuing the orders, the ITA conducted one administrative review of the countervailing duty order pursuant to Section 751 of the Tariff Act of 1930. Additionally, the ITA conducted an administrative review regarding sales between January 3, 1986 to April 30, 1987 with respect to the antidumping duty order. *See Certain Welded Carbon Steel Pipe and Tube Products from Turkey*, 53 Fed. Reg. 36932 (1988) (final admin. review). On June 29, 1988, the ITA initiated a second administrative review of the antidumping order covering sales from May 1, 1987 through April 30, 1988. The second review concerned only sales of merchandise exported by plaintiffs.

Plaintiff Borusan Ihracat Ithalat ve Dagitim A.S. is a Turkish exporter of welded carbon steel pipe and tube. Plaintiff Borusan Holding A.S. is the majority shareholder of Borusan Ihracat Ithalat ve Dagitim A.S. It is also a Turkish company. During the period of May 1, 1987 through April 30, 1988, plaintiffs made 312 sales of the subject steel pipe and tube to independent importers in the United States who had no corporate connection with plaintiffs It additionally made 80 sales to Tubeco Pipe and Steel Corporation ("Tubeco"), a Houston, Texas-based importer wholly owned by plaintiffs. In each of the total 392 sales, plaintiffs provided a refund to both Tubeco or the unrelated United States importer in the amount of estimated countervailing duties paid by them.

The ITA issued the final results of its second administrative review on October 18, 1990. *See Certain Welded Carbon Steel Pipe and Tube Products From Turkey*, 55 Fed. Reg. 42230 (1990) (final admin. review). In the final results, the ITA failed to calculate dumping margins for sales made by plaintiffs through Tubeco[2]. It only determined margins for those sales made by plaintiffs directly to unaffiliated American buyers. In the sales it did calculate, the ITA made a downward adjustment to the United States price for the refund which plaintiffs provided to the unrelated importers. The ITA indicated at Comment 8 in the final results that the adjustment to the United States price was appropriate because plaintiffs' agreement to reimburse the unrelated importers for the countervailing duties was "tantamount to a rebate or a reduction in the U.S. sales price." Administrative Record, Public Reel at 265.

In response to the final results of the second administrative review, plaintiffs filed an action in this court challenging the results. In relevant part, plaintiffs claimed in Count One of the Complaint that the ITA neglected to calculate dumping margins sales made through Tubeco to

[2] The government asserts that the omission was a technical oversight which occurred as a result of the failure to merge a computer listing of the 80 Tubeco sales with the listing of the 312 direct sales between plaintiffs and independent United States buyers.

United States customers.[3] Count Two concerned the ITA's failure to make the proper drawback duty adjustment to plaintiffs' United States price. In Count Four, plaintiffs alleged that the ITA inappropriately reduced the United States price by the amount of the countervailing duty imposed, in order to offset the export subsidies assessed.[4]

Defendant United States admitted the allegations contained in Counts One and Two of the Complaint. As a result, on May 3, 1991, Judge DiCarlo of this Court ordered a partial remand to permit the ITA to correct the issues raised in Counts One and Two. The ITA was ordered, in part, to calculate the dumping margin for the United States sales made by plaintiffs through Tubeco.

The ITA then circulated Draft Results of Partial Remand for comment by the parties. In that preliminary determination, the ITA reduced the United States price in the amount of the reimbursement from plaintiffs to Tubeco. Plaintiffs forwarded a response to the ITA in which they argued that the downward adjustment was not appropriate in the Tubeco sales. In this response, plaintiffs based their arguments on the presumption that the ITA reduced the United States price in the Tubeco sales for the identical reasons it did in plaintiffs' direct sales to unrelated purchasers.

The ITA issued its final results of the partial remand on July 5, 1991. The ITA again reduced the United States price of the 80 Tubeco sales in the amount of the rebate plaintiffs provided to Tubeco. It justified its decision by stating that:

> Whether Borusan pays this rebate or refund, or whether Tubeco pays it, is irrelevant. In all cases, the importer of record of the subject merchandise is still reimbursed for any countervailing duties assessed. This reimbursement is a rebate or reduction in U.S. price, and the corresponding downward adjustment to U.S. price was made in accordance with section 772(d)(2)(A) of the Tariff Act.

Administrative Record (Public) Doc. 10.

DISCUSSION

In the action now before this court, plaintiffs assert that the ITA's decision to reduce the United States price of sales made through Tubeco, by the amount of countervailing duties reimbursed by plaintiffs to Tubeco is not supported by substantial evidence. Defendants allege that plaintiffs raise this issue prematurely, or, alternatively, failed to exhaust their administrative remedies.

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[3] Count One provides that:

> 25. Commerce improperly failed to calculate dumping margins for the U.S. sales made by Borusan through Tubeco, notwithstanding the fact that all such sales during the review period were reported on Borusan's U.S. sales listing. Commerce's failure to calculate margins on the Tubeco sales is not supported by substantial evidence and is otherwise contrary to law.
>
> 26. Commerce erroneously did not calculate dumping margins for Tubeco's sales even though (1) the domestic interested parties and Borusan, through submissions dated April 30, 1990 and May 7, 1990, respectively, each alerted Commerce to the identical error in the preliminary determination, and (2) Commerce conceded the error and claimed to have corrected it in the final determination. (Citation omitted.)

[4] Count Four alleged:

> 32. Commerce's reduction of the U.S. price by the amount of the countervailing duty imposed to offset export subsidies is not supported by substantial evidence and is otherwise contrary to law.

A. Standard of Review:

The ITA's determination shall be upheld unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *N.A.R., S.p.A. v. United States*, 14 C.I.T. ___, 741 F. Supp. 936, 939 (1990) (quoting *Gold Star Co. v. United States,* 12 C.I.T. 707, 692 F. Supp. 1382, 1383–1384 (1988) *aff'd*, 873 F.2d 1427 (Fed. Cir. 1989)).

B. The ITA's Reduction of the United States Price:

In an antidumping proceeding, the ITA must determine the amount by which the foreign market value of each item of imported merchandise exceeds the United States price. 19 U.S.C. § 1675 (1988). For purposes of this statute, 19 U.S.C. 1677a (1988) defines the United States price as either the "purchase price" or "exporter's sales price" of the merchandise at issue. Purchase price is specifically described under 19 U.S.C. 1677a(b) as:

> [T]he price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States.[5]

The ITA has a longstanding practice of using purchase price as the United States price when domestic sales of the merchandise in question are made to related United States parties providing three qualifications are met. *See e.g. Cellular Mobile Telephones and Subassemblies from Japan*, 56 Fed. Reg. 61400 (1991) (prelim. admin. review); *Brass Sheet and Strip From the Netherlands*, 56 Fed. Reg. 56187 (1991) (prelim. admin. review). In these cases, the manufacturer must ship the merchandise directly to the unrelated buyer, without introducing it into the related selling agent's inventory. This procedure must be the customary sales channel between the parties. The related selling agent located in the United States must act only as a processor of documentation and a communication link with the unrelated buyer.[6] Further, in these cases, the ITA bases the purchase price on the price paid by the unrelated purchaser in the United States. *See e.g. Cellular Mobile Telephones and Subassemblies from Japan*, 56 Fed. Reg. 61400 (1991) (prelim. admin. review); *Brass Sheet and Strip From the Netherlands*, 56 Fed. Reg. 56187 (1991) (prelim. admin. review).

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[5] Alternatively, 19 U.S.C. 1677a(c) defines "exporter sales price" as "the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter * * *."

[6] *See e.g. Polyethylene Terephthalate Film, Sheet, and Strip from Japan* 56 Fed. Reg. 16300 (1991) which provides:

1. The merchandise in question was shipped directly from the manufacturer to the unrelated buyer, without being introduced into the physical inventory of the related selling agent;
2. This channel was the customary commercial channel for sales of this merchandise between the parties involved; and
3. The related selling agent located in the United States acted only as a processor of sales-related documentation and a communication link with the unrelated U.S. buyer.

Subsection (b) of 19 U.S.C. 1677a (1988) provides that in purchase price sales:

> [a]ppropriate adjustments for costs and expenses under subsection (d) of this section shall be made if they are not reflected in the price paid by the person by whom, or for whose account, the merchandise is imported.

The Code of Federal Regulations provides similar guidelines to the ITA. It states the ITA is to make:

> appropriate adjustments for costs and expenses * * * if they are not reflected in the sales price to the importer. Whenever purchase price is used and there is reason to believe that the sales price to the importer does not reflect the cost and expenses incident to bringing the merchandise from the country of exportation, then the Secretary will make appropriate adjustments for such costs and expenses * * *.

19 C.F.R. § 353.41(b) (1991).

Pursuant to 19 U.S.C. § 1677a(d)(1)(D), the ITA shall increase the purchase price by the amount of any countervailing duty imposed on the merchandise to offset an export subsidy. Additionally, 19 U.S.C. § 1677a(d)(2)(A) provides that the purchase price shall be reduced by:

> the amount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise * * * to the United States * * *.

All parties agree that the 80 sales made through Tubeco satisfied the necessary criteria, and it is uncontested that the ITA correctly used "purchase price" as a basis for determining the United States price. It is also conceded that the ITA properly increased the purchase price in the amount of the countervailing duty assessed.

However, plaintiffs challenge the downward adjustment made by the ITA to the purchase price. Plaintiffs assert that the ITA incorrectly reduced the purchase price by the amount which plaintiffs refunded Tubeco for countervailing duties paid by Tubeco. In support of their argument, plaintiffs point out that in purchase price sales, the ITA disregards the international related-party transfer price when determining the purchase price. Rather, it utilizes the price which the related seller, Tubeco in this instance, sells to the first unrelated American buyer. Plaintiffs contend that the record lacks support for the finding that the purchase price does *not* reflect the reimbursement from plaintiffs, as required by 19 U.S.C. § 1677a(b).

The government counters that the importer of record, Tubeco, is reimbursed by plaintiffs for countervailing duties paid by Tubeco. The cost of the duties is therefore absorbed by plaintiffs, rather than Tubeco. As a result, Tubeco is able to lower the United States price (its price to the first unrelated buyer) because Tubeco does not pay the countervailing duties. Therefore, Tubeco need not pass this cost on to the unrelated purchaser. The government can only capture this reduction in the pur-

chase price—or additional "dumping"—by considering it a "cost" or "expense" under 19 U.S.C. § 1677a(d)(2)(A), and reducing the United States price accordingly.

For analysis purposes, the government's argument will be divided into two alternative theories, neither of which the court finds persuasive. The court will first address whether the reimbursement generally is a proper adjustment to the purchase price. Both the controlling statute, 19 U.S.C. 1677a(b), and the implementing regulations, 19 C.F.R. § 353.41(b), provide that adjustments should be made for only those costs and expenses which are not reflected in the purchase price. The plaintiffs and the government agree that in this case, the cost of the countervailing duty which plaintiffs sustain permits Tubeco to reduce the United States price. The parties therefore concede that the cost of the reimbursement borne by plaintiffs, rather than Tubeco, is reflected in the purchase price.

Further, the court unsuccessfully reviewed the administrative record for evidence which shows that Tubeco did not reduce its price to the first unrelated buyer as a result of the reimbursement it received. In this review, the record was devoid of any evidence which demonstrates that the reimbursement was not reflected in the purchase price, as 19 U.S.C. 1677a(b) requires.

Consequently, the court finds that the ITA's determination that the cost of the reimbursement is not reflected in the purchase price is not supported by substantial evidence. The cost of the reimbursement from plaintiffs to Tubeco is not a proper reduction in the United States price.

Alternatively, the court notes that even if the government could establish that Tubeco did not reduce the United States price to reflect the reimbursement, the government cannot establish that the reimbursement is properly deductible for a second reason as well. The final results of the first remand noted that a downward adjustment was made in accordance with section 19 U.S.C. 1677a(d)(2)(A). This section permits reductions for amounts attributable to additional costs and expenses incident to importing the merchandise.

At the court's request, the parties examined the administrative record to identify any evidence regarding whether or not any amount in the purchase price between Tubeco and the unrelated buyer was in fact attributable to plaintiffs' "cost" of reimbursing Tubeco for the countervailing duties. In addition, the court independently reviewed the administrative record for the information. Neither the parties nor the court were able to locate any evidence to support the ITA's determination that the purchase price was increased by plaintiffs' "cost" of rebating the countervailing duty to Tubeco. Therefore, the court finds that in these circumstances, a determination by the ITA that an amount in the purchase price was attributable to plaintiffs' reimbursement cost is not supported by substantial evidence in the record. The reduction in the purchase price for the cost of the reimbursement pursuant to 19 U.S.C. 1677a(d)(2)(A) would likewise be an improper adjustment.

C. Procedural Challenges:

The first issue advanced by defendant is that plaintiffs failed to exhaust their administrative remedies. The government argues that notwithstanding the technical omission in the administrative review of the dumping margins for Tubeco sales, plaintiffs were aware during the agency proceedings that the ITA intended to downwardly adjust "all" purchase prices in the amount of the reimbursement. The government theorizes that plaintiffs should have known that the purchase price for sales made through Tubeco sales would likewise be included in this reduction. Consequently, plaintiffs were required to challenge the downward adjustment in Tubeco sales during the initial agency proceedings, which they failed to do.

The court agrees with the government that plaintiffs are required to address all relevant issues during the agency proceedings. Section 2637(d) of Title 28, United States Code (1988), provides that the court shall, "where appropriate, require the exhaustion of administrative remedies." (*See also Unemployment Compensation Commission of Alaska v. Aragon*, 329 U.S. 143, 155 (1946) (The "reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action"); *National Knitwear & Sportswear Association v. United States* 15 C.I.T. ____, 779 F. Supp. 1364 (1991).)

However, in this case, plaintiffs were not aware of the ITA's methodology for calculating Tubeco sales' dumping margin until the results of the first remand. Prior to the issuance of those remand results, plaintiffs could not have predicted that the ITA would treat plaintiffs' direct sales to unrelated American purchasers identically with Tubeco's sales to unrelated buyers. Consequently, its first opportunity to challenge the ITA's reduction in the Tubeco sales purchase price was during the remand proceeding. The court finds that therefore, plaintiffs did in fact exhaust their administrative remedies.

The government asserts alternatively that plaintiffs' request for a second remand is premature. It claims that the first remand concerned only Counts One and Two of the Complaint, and the reduction in Tubeco's purchase price can only be raised under Count Four in a U.S.C.I.T. Rule 56.1 brief.

The court again finds the government's position untenable. The challenged administrative review results found dumping margins for plaintiffs' direct sales to unrelated American purchasers only; they omitted findings concerning plaintiffs' sales made through Tubeco. Count Four could not have addressed any reduction in the Tubeco sales purchase price because the ITA had not as yet issued findings concerning Tubeco at the time the Complaint was filed. Indeed, plaintiffs specifically challenged the omission of the Tubeco sales dumping margin in Count One. The court holds that plaintiffs' request for a second remand was made in a timely fashion.

CONCLUSION

For the reasons provided above, this court holds that the ITA's final results of partial remand were not supported by substantial evidence or in accordance with law. Accordingly, plaintiffs' motion for a second remand is granted.

(Slip Op. 92–58)

D&M WATCH CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 83–12–01775 etc.

OPINION AND ORDER

[Plaintiffs' motion for citation of contempt and other relief against the defendant granted, in part.]

(Dated April 24, 1992)

Irving A. Mandel (*Steven R. Sosnov* and *Jeffrey H. Pfeffer*) for the plaintiffs.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice (*James A. Curley*); Office of Assistant Chief Counsel, U.S. Customs Service (*Edward N. Maurer*), of counsel, for the defendant.

AQUILINO, *Judge:* Final judgment entered in the above-numbered action on May 7, 1990 and in 104 other, similar actions between April 1990 and December 1991 on behalf of various named plaintiff importers, including D & M Watch Corp., docketed in this Court of International Trade as 83–01–00040–S, 83–04–00548, 83–05–00723, 83–07–00957, 83–07–00986, 83–07–00988–S, 83–07–01058, 83–08–01243, 83–08–01246, 83–09–01287–S, 83–09–01289, 84–01–00008, 84–01–00128, 84–03–00424, 84–03–00428, 84–04–00473, 84–06–00848, 84–07–00957, 84–07–00972, 84–07–00982, 84–07–00986, 84–07–00988, 84–08–01117, 84–09–01323, 84–11–01567, 84–11–01568, 84–12–01794, 85–01–00058, 85–02–00162, 85–02–00165, 85–02–00227, 85–03–00368, 85–03–00443, 85–04–00501, 85–04–00573, 85–05–00729, 85–07–00996, 85–08–01012, 85–08–01013, 85–08–01071, 85–08–01073, 85–08–01117, 85–08–01118, 85–08–01119, 85–09–01156, 85–10–01523, 85–10–01527, 86–04–00440, 86–04–00441, 86–05–00595, 86–05–00596, 86–06–00768, 86–06–00771, 86–06–00793, 86–07–00846, 86–07–00847, 86–07–00849, 86–07–00945, 86–09–01128, 86–09–01209, 86–11–01399, 86–11–01489, 86–12–01505, 86–12–01506, 86–12–01532, 86–12–01593, 87–01–00030, 87–01–00052, 87–01–00078, 87–01–00090, 87–01–00108, 87–02–00180, 87–03–00482, 87–03–00515, 87–03–00516, 87–03–00521, 87–03–00538, 87–03–00539, 87–08–00862, 87–08–00863, 87–08–00864, 87–08–00865, 87–08–00871, 87–09–00920, 87–09–00922, 87–09–00967,

87–09–00968, 87–09–00972, 87–10–01002, 87–10–01003, 87–10–01015, 87–10–01042, 87–11–01072, 87–12–01151, 87–12–01153, 88–02–00115, 88–02–00146, 88–04–00267, 88–04–00306, 88–04–00313, 88–05–00371, 88–07–00529, 88–07–00531 and 88–07–00532. Each of the judgments had been submitted to the court upon an agreed statement of facts and bearing the names of the respective lead counsel of record. Each provides *in haec verba:*

> "This action, as prescribed by Rule 58.1 of the Rules of the United States Court of International Trade, has been stipulated for judgment on agreed statement of facts, in which the parties agree that the merchandise in issue on the attached schedule is limited to quartz watches having less than 17 jewels and their components identifiable from the invoices and other entry documents as watches, quartz analogue watches, quartz digital watches, watches incorporating a battery or components (cases, movements and bands) which are similar in all material respects to the merchandise in *Belfont Sales Corp. v. U.S.*, 666 F. Supp. 1568 (CIT 1987), *reh'g denied*, 698 F. Supp 916 (CIT 1988), *aff'd* 878 F.2d 1413 (Fed Cir. 1989) or *Texas Instruments Inc. v. United States*, 518 F. Supp. 1341 (CIT 1981), aff'd, 69 CCPA 136, 673 F.2d 1375 (CCPA 1982) * * * which records have been incorporated herein, are properly dutiable as entireties and classifiable as "electrical articles and electrical parts of articles, not specially provided for: Other." or as solid-state electronic timepieces under T.S.U.S. item 688.45 as modified by item 688.42 or 688.43, or under item 688.36, at the rate of duty in effect at the date of entry.
>
> All other claims are abandoned. Batteries are not included.
>
> It is hereby ORDERED that the Regional Commissioner at the port of entry shall reliquidate the entry (entries) at the rate of duty in effect at the time of entry and refund all excess duties paid, together with interest as provided by law.
>
> BY ORDER OF THE COURT

Appended to each judgment is a schedule of the entries and protests encompassed by the encaptioned civil action. Some schedules set forth entry numbers which have been annotated as "not stipulable" by counsel. The judgment in the above D & M action, for example, covers 20 entries, none of which was so marked prior to signing by the court.

Come now the plaintiffs, alleging that the defendant has refused, and continues to refuse, to reliquidate the scheduled entries in compliance with the court's final judgments. Upon receipt of a proposed order to show cause, an immediate hearing was held thereon in open court, during which counsel did not deny that the government did not comply with the mandates. The defendant was thereupon directed to show cause why an order enforcing the judgments should not issue pursuant to CIT Rules 7(e) and 63

> 1) compelling [it] to turn over all relevant entry papers to the Court; 2) compelling [it] to reliquidate the Customs entries included in the cases herein with refunds of duty together with interest; 3) adding to the Schedules attached to the Judgment Orders all entries repre-

> sented by Customs as "missing" but found to be available; 4) compelling [it] to search for all entries initially reported by Customs as missing and not yet found, for subsequent addition to the Schedules; and 5) to pay reasonable counsel fees necessitated by this proceeding.

The defendant was also restrained temporarily from disposing of or removing the entry papers covered by the final judgments.

A hearing in conformity with Rule 63 commenced on April 3 and concluded on April 13, 1992. This opinion represents the court's findings of fact and conclusions of law.

I

As recited in the judgments, they are based on *Belfont Sales Corp. v. United States*, 11 CIT 541, 666 F.Supp. 1568 (1987), *reh'g denied*, 12 CIT 916, 698 F.Supp. 916 (1988), *aff'd*, 878 F.2d 1413 (Fed.Cir. 1989). In that test case within the meaning of CIT Rule 84, this court had found, among other things, that a quartz analogue watch or "QAW" does contain a watch movement when viewed in the light of *Texas Instruments Inc. v. United States*, 82 Cust. Ct. 272, C.D. 4810, 475 F.Supp. 1183 (1979), *aff'd*, 620 F.2d 269 (CCPA 1980), *Texas Instruments Inc. v. United States*, 82 Cust. Ct. 287, C.D. 4811, 475 F.Supp. 1193 (1979), *aff'd*, 620 F.2d 272 (CCPA 1980), and *Texas Instruments Incorporated v. United States*, 1 CIT 236, 518 F.Supp. 1341 (1981), *aff'd*, 673 F.2d 1375 (CCPA 1982), but had concluded that such a timepiece was properly classifiable under Schedule 6 to the Tariff Schedules of the United States, specifically item 688.45, as opposed to TSUS item 715.05, upon which the defendant had relied in imposing duties. The courts in the last of those Texas Instruments cases had reached the same conclusion with regard to quartz digital watches.

The Court of Appeals for the Federal Circuit issued its mandate in *Belfont* in June 1989, by which time hundreds of actions had been suspended under that test case pursuant to CIT Rule 84(a). In accordance with Rule 85, a suspension disposition calendar was then established for those actions for a period of 90 days, and all of the plaintiff importers were so notified in September 1989. On its part, the defendant responded with a letter to the court dated October 5, 1989, indicating that "about 600 cases" had been suspended under *Belfont* and stating:

> We are advised by the Customs Service that marking of the entry papers will not be necessary for merchandise that entered through the Port of New York. However, for entries through other ports, marking will be necessary. It will also be necessary for the Government to determine whether the duties were paid in a timely manner for all entries, and the protests and summonses were timely filed.
>
> Many cases have a large number of entries. Missing entries will have to be reconstructed before they can be stipulated. Based on our past experience with similar large disposition calendars, we estimate that between one and two years may be necessary to dispose of all stipulable cases and entries we expect to receive.

Counsel for certain plaintiff importers tended to agree that more than 90 days would be needed to process the actions to judgment off the suspension disposition calendar. Motions for extensions of the time and concomitant scheduling conferences between counsel and the court ensued. Some motions were denied. *E.g., E. Gluck Corp. v. United States*, 13 CIT 922 (1989). Some actions were dismissed. *E.g., Fada Industries, Inc. v. United States*, 14 CIT ___, Slip Op. 90–89 (Sept. 7, 1990). In others, extensions were granted, but only upon adequate showings "that counsel ha[d] conducted 'reasonable inquiry' of the kind contemplated by CIT Rule 11 and that, after such review and consideration, the Rule 1 goal of a just, speedy, and inexpensive determination of every action would be furthered by grant of an extension of time", to quote the admonition in *E. Gluck Corp.*, 13 CIT at 923 n. 2.

By late summer 1990, the court had entered final judgments agreed to by both sides in some of the actions enumerated above. However, by that time the court had also received copies of correspondence sent by plaintiffs' counsel to the defendant, complaining about the processing of them by Customs, alleging, among other things, on August 31, 1990 that the Service was "still losing an extraordinary number of analogue watch and other entries" and on September 10, 1990 that "Customs is again demanding that the importer reconstruct these entries based solely on the unwarranted threat that no duty refunds will be issued" [emphasis deleted]. Those accusations led to a conference in chambers on October 2, 1990, at which plaintiffs' counsel appeared with draft complaints for their actions in hand, ready for filing as a means under Rule 85(c) for removal from the suspension disposition calendar within the period set by the court. Defendant's counsel protested however that removal and then joinder of issue would not be necessary; further extension of time on the suspension calendar would enable the parties to achieve stipulations in the actions. *Cf.* plaintiffs' Exhibit 5. The time was thereupon extended, and stipulations were in fact signed and sent to the court.

Final judgments in the form submitted were duly executed, but the plaintiffs now prove that those orders have not necessarily led to reliquidation of the listed entries.

II

Indeed, as was true in response to the original application for an order to show cause, at the lengthy hearing on plaintiffs' motion for relief the defendant neither denied nor otherwise sought to refute the gravamen of the complaint that Customs had not and would not reliquidate entries on the schedules attached to the judgments.[1] The defense now presented is that the Service had a responsibility, if not a right, to scrutinize each and every such entry, as reflected in whatever papers were available, to determine if quartz analogue or quartz digital watches were in fact part thereof and thus subject to reliquidation in the light of the

[1] Copies of most of them were produced at the hearing and received in evidence together and with various attachments as plaintiffs' gross exhibit 1.

cited, controlling test cases. If the reliquidators assigned to the task could not make such an affirmative determination, essentially that was the end of the matter.

The evidence adduced at the hearing indicates that this approach has been taken only for New York entries–under the auspices, and at the direction, of the Chief of the Residual Liquidation and Protest Branch in the Region, Lawrence Ryan, apparently in consultation with other members of the Customs Service, including an attorney. In any event, he testified that his approach was going to be "totally different"[2]:

> I recognized that this case was going to be different than all other cases–just about any case, to my knowledge. It was going to be different, and I ordered my staff to begin using * * * a form letter [of denial of reliquidation].
>
> * * * * * * *
>
> The difference here–usually under a stipulation the entries are green inked * * * [and s]uch * * * items marked * * * will be issued a refund.
>
> We can go into the entry documents and we'll see the green inkings. And there I would have an understanding that there was an agreement * * * to give a refund on those items.
>
> Here, we had no such green inkings. This, to my knowledge, to my understanding, * * * was going to be a totally different process.
>
> * * * * * * *
>
> Generally, in a stipulation procedure my office * * * receives entry documents from the court. In there, attached to those documents, is a proposed agreement. * * * [M]y office then transmits those documents to, generally, an import specialist; that person who is going to be doing the review. The import specialist will look at the entry documents, will look at what is proposed, and where he finds that he can agree, he will, in green ink, mark off the items so the[re will be no misunderstanding later on. Those entries then are transmitted back to my office; back to the court.

Tr. at 151–52. Mr. Ryan proceeded to testify, and the court so finds, that he was responsible for "this new procedure" and

> that procedure would be not to send the entries to the import specialist but to develop what I called the "generic stipulation," which would permit the processing through the court but then would place an obligation upon my staff and my office to review the entry documents and to make a determination similar to what the import specialist would have made under the normal procedure. The only distinction here is that this is being made after the court has ordered us to make a review, as opposed to prior.

Id. at 153–54. Nonetheless, the witness also testified that he had directed some four to six Customs employees to work with Department of

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[2] Witnesses for the plaintiffs indicated that they had never experienced such an approach in 25 or more years of working for or with Customs. Hearing Transcript ("Tr.") at 97, 26162, 266–67. On his part, Mr. Ryan conceded that "this was a judgmental area that I was entering into." *Id.* at 160.

Justice personnel in reviewing individual entries, including marking some off as "not stipulable", before any submissions to the court. *See id.* at 154–55.

As indicated, submissions on agreed statements of facts were presented to the court in each of the actions at bar, personally signed by lead counsel of record for both sides. An attorney for the plaintiffs, called by them as a witness at the hearing, testified that both sides had made every effort to be careful and accurate. *Id.* at 57, 76, 83. While the record shows that the plaintiffs proposed, it also shows, and the court finds, that the defendant dictated, if not composed, the ultimate terms of the submissions at issue. *See, e.g., id.* at 12, 13, 40, 74, 466, 469, 485–93. *Cf.* plaintiffs' Exhibit 17 and Tr. at 514–16. Indeed, the evidence on behalf of the defendant is clearly to the effect that the only reliquidation intended was for quartz analogue (or digital) watches. This is, and was, appropriate, given the precise holdings of the test cases. Hence, each of counsel's submissions stipulates:

> 1. Plaintiff is the importer of record and consignee of the merchandise covered by the entries listed in the attached schedule.
> 2. All protests listed in the schedule were timely filed, contested the classification and rates of duty assigned to the merchandise upon liquidation.
> 3. All liquidated duties were paid prior to the commencement of this action, and all other conditions precedent have been performed or have occurred.
> 4. The merchandise, if any, in issue in the entries listed on the schedule is limited to quartz analog watch movements, quartz analog watches, or quartz analog digital watches, as described in Paragraph 5, below.
> 5. The watch movements were classified and assessed with duty upon liquidation at the rates for watch movements under any of the provisions in items 716.09 through 716.45, TSUS, inclusive. Quartz analog watches and quartz digital watches were classified under Item 715.05, TSUS, and duty was assessed upon liquidation at a rate derived in part from the rates for watch movements under any of the provisions in items 716.09 through 716.45, TSUS, inclusive.
> 6. The merchandise is similar in all material respects to the merchandise in *Belfont Sales Corp. v. The United States, * * * or Texas Instruments Inc. v. The United States* * * * [citations omitted].
> 7. Quartz analog watch movements are properly classified as electrical parts of articles under Item 688.40, 688.45, 688.43, or 688.42, depending upon the date of entry, and are dutiable at the rate in effect on the date of entry. Quartz analog watches are properly classifiable as an entirety as electrical articles under the same provisions and dutiable at the rate in effect on the date of entry. Quartz digital watches are properly classifiable as an entirety as solid-state electronic watches under item 688.36 and dutiable at the rate in effect on the date of entry. Batteries are separately dutiable as liquidated, and are not included as part of this stipulation for reliquidation. * * *

Defendant's Exhibit A. The submissions further stipulate and agree that the encaptioned actions were being "submitted for decision upon this stipulation * * * limited to the articles and entries described [t]herein and described in the attached schedule[s] and all other claims are abandoned."

It was upon that representation that this court considered and decided to sign the judgments. The defendant now places great emphasis on the "if any" language of the submissions, paragraph 4,[3] while the plaintiffs counter that those words are not found in the judgments. This is true, although each judgment does state that "the merchandise in issue on the attached schedule is limited to quartz watches having less than 17 jewels and their components identifiable from the invoices and other entry documents as watches, quartz analogue watches, quartz digital watches, watches incorporating a battery or components (cases, movements and bands) which are similar in all material respects to the merchandise in *Belfont Sales Corp.*" etc.

However precise (or imprecise) the chosen language, on the part of the court there was no doubt then, and there is no doubt now, what the parties intended or what the law permitted. No employee of the government, including an officer of the Customs Service, which bears the historical burden of collecting and protecting revenues of the United States, has authority to cede them to private interests at his or her personal discretion. But it is equally true that such an employee does not have discretion to withhold property lawfully belonging to those interests.

Each of the judgments at issue

> ORDERED that the Regional Commissioner at the port of entry shall reliquidate the entry (entries) at the rate of duty in effect at the time of entry and refund all excess duties paid, together with interest as provided by law.

Nothing in these decrees was left to the discretion of Customs[4], nor was there any intent on the part of the court to do so. This was the case not only because counsel did not make known in their formal submissions or otherwise that Customs had opted for a "totally different" approach, more importantly, a "decision of the Court of International Trade is final and conclusive, unless a retrial or rehearing is granted * * * or an appeal is taken". 28 U.S.C. § 2645(c). Indeed, the Service itself has adopted a regulation, 19 C.F.R. § 176.31, which states:

> SUBPART D—PROCEDURE FOLLOWING COURT DECISION
>
> **'§ 176.31 Reliquidation following decision of court.**
>
> (a) *Decision of U.S. Court of International Trade.* Except as provided in paragraph (c) of this section, an entry which is the subject of a decision of the U.S. Court of International Trade shall be reli-

[3] However, Mr. Ryan indicated that he did not actually receive the stipulations possessed of this precise language. *See* Tr. at 147. In any event, he informed plaintiffs' representative that "he could not go along" with the wording. *Id.* at 102.

[4] Mr. Ryan conceded this point on the witness stand. *See* Tr. at 167.

> quidated in accordance with the judgment order thereon at the expiration of 60 days from the date of the decision, unless an appeal or motion for a rehearing is filed. However, entries which are the subject of decisions of the court following a decision of the Court of Appeals for the Federal Circuit which involve the same issue, or which are based on submission of an agreed statement of fact, may be reliquidated immediately upon receipt of the judgment orders from the U.S. Court of International Trade.[5]

Of course, these rules of law do not preclude redress for judicial fallibility. CIT Rule 60(a), for example, provides for relief from a judgment possessed of clerical error, while subsection (b) contemplates other mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, etc. Hence, whenever the reliquidators encountered entries arguably beyond the understood scope of the judgments, they had an open avenue to the court for relief.[6] Customs did not take it. Rather, form letters of rejection, which had never been used before, were sent to the plaintiffs, who reacted with vituperation and, inevitably, this extraordinary proceeding, which entailed taking of the witness stand by attorneys of record on both sides in their own defense.

Understandably, the plaintiff importers have believed that they prevailed in the test-case litigation over the last decade. They also believed that they had achieved settlements with the defendant in the actions suspended thereunder. That had also been this court's impression. The defendant denies this. It sought, and still seeks, refuge in the paperwork which piled up and/or was misplaced. To be sure, Customs is responsible for this phenomenon,[7] which its own witness characterized as "chaotic"[8] and a "nightmare". Tr. at 417. Indeed, at the very first conference after creation of the suspension disposition calendar in September 1989, counsel for the defendant convinced the court of the potential problems inherent in reliquidating the accumulated entries. The court appreciated then as now the burdens the Service faced and faces. Respect for those responsibilities was a main reason for the grants of extensions of time. When months passed before stipulations and judgments were finally submitted, the court assumed that the parties had been working together to get entry papers in order either for reliquidation or abandonment. It did not know or assume that the New York Customs Region had adopted a "totally different" procedure. Mr. Ryan indicated that he reached this decision with a view toward the apparent magnitude of the

[5] The paragraph (c) referred to simply permits shortening of the time upon waiver of any right of appeal by the government.

[6] By way of example, in March 1992 this court signed a stipulated judgment in another, unrelated action only to have the parties return now for certain amendments "to avoid any potential misunderstanding on reliquidation of the entries involved in this matter". Plaintiff's Consent Motion to Amend Judgment, *Leslee Sports Importing, Ltd. v. United States*, CIT No. 90–08–00380 (April 10, 1992). Moreover, judgments have been entered on behalf of other watch importers under *Belfont* without further ado and based on arguably less restrictive language than herein. *Cf., e.g.*, plaintiffs' Exhibits 6 (*E. Gluck Corp. v. United States*, CIT No. 82–11–01548 (Dec. 17, 1991)) and 7 (*Casio, Inc. v. United States*, CIT No. 88–05–00334 (Dec. 17, 1991)). In fact, numerous, additional stipulated judgments on agreed statements of facts have just been forwarded to the court *sub. nom. E. Gluck Corp. v. United States* for entry under *Belfont* with expansive terms of the kind already so ordered in No. 82–11–01548.

[7] *See, e.g.*, 44 U.S.C. ch. 31. 8 Tr. at 416.

[8] Tr. at 416.

process. But then that decision, essentially to await receipt of the judgments before making any definitive assessments, hardly justifies more than two years for the filing of those forms. Moreover, as returned, the precise language of the decrees did not permit the kind of *ex post facto* plenary decision-making engaged in by the reliquidators, none of whom apparently was very familiar with either the merchandise referred to or the underlying litigation. As stated in *Nozaki Bros., Inc. v. United States*, 41 Cust.Ct. 245, 250, C.D. 2048 (1958), the "collector, when reliquidating pursuant to court order, functions in a ministerial or clerical capacity only; he makes no voluntary decision and must follow the judgment of the court to the letter", citing *Smith v. United States*, 1 Ct.Cust.App. 489, T.D. 31527 (1911); *United States v. Kurtz, Stuboeck & Co.*, 5 Ct. Cust. App. 144, T.D. 34192 (1914); *Roessler & Hasslacher Chem. Co. v. United States*, 13 Ct. Cust. App. 451, T.D. 41347 (1926); *United States v. Edward M. Poons Co.*, 18 CCPA 283, T.D. 44451 (1930); *Wm. Wetstein v. United States*, 10 Treas. Dec. 531, T.D. 26848 (1905); *Formica Insulation Co. v. United States*, 60 Treas. Dec. 576, T.D. 45178 (1931); *Bullocks, Inc. v. United States*, 68 Treas.Dec. 99, T.D. 47809 (1935); *Frank P. Dow Co. v. United States*, 69 Treas.Dec. 336, T.D. 48163 (1936); *Los Angeles Trading Co. v. United States*, 1 Cust. Ct. 264, C.D. 62 (1938); *Fulghum & Co. v. United States*, 1 Cust.Ct. 284, C.D. 66 (1938); and *Walser Mfg. Co. v. United States*, 69 Treas. Dec. 1286, Abs. 34067 (1936). *Accord Schenley Distilleries, Inc. v. United States*, 40 CCPA 202, 207–08, C.A.D. 519 (1953) ("The collector had no further function to perform except the purely formal reliquidation, and the strictly clerical task of computing * * *. He had no decision to make").

Restating this well-settled, controlling principle, however, does not necessarily aid a reliquidator in following a judgment to the letter when the underlying documentation is unclear or sloppy or missing. The plaintiffs claim to have done the best they could in assisting the defendant, but they have not distinguished themselves and, in fact, may be in violation of the spirit, if not the letter, of 19 U.S.C. § 1508, which requires importers to make, keep, and render for examination and inspection entry documents of the kind needed for proper administrative action.[9] The plaintiffs do not gainsay this point, which they contend supports their corollary position that the judgments they agreed to were compromises. Indeed, inherent in a compromise under the duress of litigation is recognition by opposing parties of their less-than-preclusive positions.

The plaintiffs agreed to the marking of numerous entries as "not stipulable" – all in the handwriting of defendant's counsel, who admit reaching compromises in other Customs cases[10] but adamantly deny

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[9] Section 1508(c) requires that such documents be kept for a period not to exceed five years from the date of entry, most of which dates in these actions are now beyond this statutory limitation. Then again, such papers in the hands of importers would not necessarily have revealing notations from Customs on them.

[10] The court is referred, for example, to a "compromise settlement" in *W.Y. Moberly, Inc. v. United States*, CIT No. 8609–01137 (Aug. 9, 1990), defendant's exhibit Co. But defendant's exhibits S and T do not contain precisely those two words, rather language analogous to that at issue herein, yet reliquidation, as ordered, was apparently accomplished without any ado. *See One Up Fashions, Inc. v. United States*, CIT No. 87–03–00509 (April 23, 1990).

doing so herein. Not only does the defendant seek to hide behind its chaotic paper nightmare but also its *ad hoc* concepts of the imported merchandise, as gleaned from those documents available. For the best evidence, the goods themselves, had long since gone into commerce, leaving only cryptic descriptions of them on their entry papers. And the reliquidators were apparently instructed by the Service's national import specialist for watches and clocks, Lewis Piropato, to subject them to a restrictive reading. *Cf.* Tr. at 99 and 337–94 *passim*. In the above D & M action, for example, such a reading of the 20 stipulable entries led to their all not being reliquidated.[11] The form letter sent D & M to that effect and dated August 1, 1990 stated that, in "reviewing the entries * * *, we found that the invoice description was insufficient to allow us to conclude that the watches imported were of the quartz analog variety" and demanded descriptive literature within 30 days that they were in fact of that variety or else the matter would be considered closed. When the plaintiffs challenged this decision herein, the defendant called upon Mr. Piropato, who had recently retired from duty, to review the D & M entry papers and as many others as the timing of the hearing would allow. He did so, but, contrary to the Service's August 1 letter, he apparently concluded that those papers did have descriptions sufficient for him to adjudge that all the timepieces referred to therein were "mechanical". *See* Defendant's Exhibit KK, pp. 48–52. In attempting to support this conclusion, Mr. Piropato referred to exhibits HH, II and JJ, which had first surfaced in 1986 at the trial of *Belfont* itself. In fact, those schematic depictions of timepieces and their mechanical movements assisted the court in opining that quartz analogue watches are also possessed of such movement. In other words, the mere mention of "mechanical" on the entry papers should not automatically exclude QAW's, particularly when, during those years, Customs was erroneously classifying all such merchandise under TSUS Schedule 7 but making it known to the importers that that was the schedule to be entered under – or else. *See, e.g.*, Tr. at 130–34, 265, 278, 321, 336 (the "quartz analog watch is part electronic, part mechanical"), 384–86. Moreover, Mr. Piropato agreed with the court that mechanical watches, those possessed of a mainspring and hairspring, among other traditional parts, essentially are no longer imported into the United States. *See id.* at 345–46. On the important issue of timing, he testified that, in but three days, he had been able to peruse approximately one third of all the entries at issue and prepare voluminous exhibit KK thereon. Finally, Mr. Piropato concluded that a number of the entries considered by him had indeed been QAW's, erroneously denied reliquidation on his own terms by his own trainees. *See id.* at 366. On their part, plaintiffs' own investigation at the Custom-

[11] In this action, a complaint dated June 26, 1985 and personally signed by a reputable member of the Bar not now before the court had been filed, alleging, among other things, that the merchandise "involved in this action consists of electronic quartz analog watches" and that the "subject watches are electrical articles" and "solid-state electronic watches." Defendant's Exhibit QQ. The testimony of the experienced Justice Department Attorney in Charge was that he expects, as does the court, lawyers to make reasonable inquiry into the facts alleged in a complaint before being drafted, served and filed. *See* Tr. at 509–10, 52728. *Cf.* CIT Rule 11.

house discovered entry papers which had been claimed to have been lost, thereby causing their abandonment prior to stipulation to the court.

III

In the face of such evidence, mostly from agents of Customs itself, adduced after a decade of adverse adjudication of their position on the merits, it is difficult to decide that the defendant is not now in contempt of court, which, in actions such as these, has been defined as

> [a]ny act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity. Committed by a person who does any act in willful contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by one who, being under the court's authority as a party to a proceeding therein, willfully disobeys its lawful orders or fails to comply with an undertaking which he has given.

Black's Law Dictionary, p. 288 (5th ed. 1979) In *Bullocks, Inc. v. United States*, for example, it was stated as follows:

> The judgment issued by this court * * * was a lawful writ, process, order, rule, decree, or command of this court, and the collector's refusal to obey the same clearly constitutes an act of contempt of this court.

68 Treas. Dec. at 104. In that case, the government had refused to reliquidate upon its determination that the merchandise was not covered by the particular protest. The Customs Court, however, declared its decision conclusive on everyone and specifically directed the defendant to act accordingly:

> * * * So long as jurisdiction * * * resided in the collector, the law allowed him broad latitude as to the action he might take and a wide range of discretion, but once the collector had lost jurisdiction over the case he became nothing more than a mere ministerial officer to follow and obey the mandates of this court * * * and it is not for him, once a decision has been rendered by this court, and the time for appeal therein has expired, to say whether or not the merchandise covered by a decision is or is not the merchandise covered by a protest. That is a matter which has already been determined by this court and is no longer open to so much as a suggestion from the collector.

Id. at 102. Similarly, in *Aris Gloves, Inc. v. United States*, 20 Cust. Ct. 102, 105, C.D. 1091 (1948), the collector argued that the judgment contained a latent ambiguity which was not discovered until the actual process of reliquidation, and that, when such an ambiguity exists in a judgment, "the collector has the right and power to construe and interpret the judgment in order to effectuate the intent of Congress". In response, the judge(s) stated:

> We are in complete disagreement with these contentions of the defendant. There can be no doubt but that when a judgment contains an ambiguity there is only one place where the judgment may

> be construed, or its provisions, directions, and orders interpreted, or the ambiguity eliminated —to wit, in the courts.

Id. at 105. The court noted that the stipulation was "freely entered into by competent representatives of the parties, and the case submitted"[12], and that, if there was a problem with the judgment, the solution was to seek amendment. Indeed, in view of the evidence adduced in the actions at bar, this court is constrained to recite further from the lead opinion in *Aris*, to wit:

> The proposition that the power of construction or interpretation of judgments may reside in one of the litigants to an action, or in its representatives, is so fundamentally absurd that the court is amazed that the defendant herein should seriously urge it.

Id. at 106. *Cf. American Grape Growers Alliance for Fair Trade v. United States*, 9 CIT 568, 622 F.Supp. 295 (1985). Perhaps it is the nature of our adversarial system, or the individual adversaries themselves, which cause such a proposition to be reasserted from time to time, but, whenever it is, it tends to diminish the dignity of and respect for judicial review and the resultant process, including the lawyers who as officers of the court are critical to the tried and true administration of justice.

At least the appearance of that dignity and respect, which transcends the protests and the personalities involved herein, must be restored. To this end, the defendant must comply with the final judgments by reliquidating entries listed on their appended schedules. As the Assistant U.S. Attorney General has recently opined, "much of the current criticism of our legal system results from just [such attempted] separation of process from the aims of justice that process is supposed to serve". Gerson, *When Lawyers Must Disclose*, N.Y. Times, April 9, 1992, at A25.

IV

Included in the relief the plaintiffs seek is an award of their attorneys' fees and costs necessitated by this extraordinary proceeding. The defendant opposes any such award, and, prior to commencement of the hearing, it notified the court in writing that the parties had agreed that, if its opposition were overruled, the amounts for any award would be "determined at a later date."

This agreement comports with orderly procedure, particularly when the defendant still has to purge itself of its position in contempt. For the moment, the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, applies to actions in this Court of International Trade[13], pursuant to which parties in plaintiffs' position can recover their attorneys' fees and expenses and costs against the United States. Subsection (a) provides that costs, not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought against the United States or any agency or official of the United States acting in his

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[12] 20 Cust. Ct. at 107.

[13] *See, e.g., Atochem v. United States*, 9 CIT 207, 210, 609 F.Supp. 319, 322 (1985), citing *Bar Bea Truck Leasing Co. v. United States*, 4 CIT 137 (1982).

or her official capacity in any court having jurisdiction of such action. Subsection (b) provides that a court may award reasonable fees and expenses to the prevailing party as aforesaid and that the United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award. Subsection (c)(2) states:

> Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

And subsection (d)(1)(A) provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

To be "prevailing", a party must show it is more probable than not that the government would not have performed the desired act absent the litigation. *See, e.g., Public Citizen Health Research Group v. Young*, 909 F.2d 546, 550 (D.C. Cir. 1990) (comparing this requirement to tort law "but for" causation); *Jean v. Nelson*, 863 F.2d 759, 765–66 (11th Cir. 1988), *aff'd*, 496 U.S. 154 (1990). Certainly, after more than a decade of successful litigation, plus their clear and convincing ancillary proof presented now, the plaintiffs meet this requirement.

The government's failure to prevail, however, does not create a presumption that its position was not substantially justified. *See, e.g., Kali v. Bowen*, 854 F.2d 329, 332 (9th Cir. 1988); *Sierra Club v. Secretary of the Army*, 820 F.2d 513, 517 (1st Cir. 1987); *Schuenemeyer v. United States*, 776 F.2d 329, 331 (Fed. Cir. 1985). That standard has been interpreted to mean justified in substance or in the main, not justified to a high degree; the action must be justified to a degree which could satisfy a reasonable person and must have a reasonable basis in both law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *Morris Mechanical Enterprises v. United States*, 728 F.2d 497, 499 (Fed. Cir.), *cert. denied*, 469 U.S. 1033 (1984); *Bailey v. United States*, 721 F.2d 357, 360–61 (Fed.Cir. 1983). The government has the burden of proving satisfaction of that standard. *E.g., Jones v. Lujan*, 887 F.2d 1096, 1098 (D.C.Cir. 1989); *McDonald v. Secretary of Health and Human Services*, 884 F.2d 1468, 1473 (1st Cir. 1989); *Bonanza Trucking Corp. v. United States*, 11

CIT 436, 439, 664 F. Supp. 1453, 1455 (1987). Its "position" is both its litigation stance and the underlying administrative action or inaction. 28 U.S.C. § 2412(d)(2)(D); *Urbano v. United States*, 15 CIT___, ___, 779 F. Supp. 1398, 1401 (1991), citing *Brewer v. American Battle Monuments Comm'n*, 814 F.2d 1564, 1569 (Fed. Cir. 1987), and *Traveler Trading Co. v. United States*, 13 CIT 380, 382, 713 F. Supp. 409, 411 (1989). *See also Jones v. Lujan*, 887 F.2d at 1097 (position comprehends both the United States' underlying action and its litigation posture); *Keasler v. United States*, 766 F.2d 1227, 1231 (8th Cir. 1985).

Where the government's position rests, as here, squarely on the administrative rejection of final court judgments, its derivative stance is also without a substantially justified basis. In short, defendant's burden is not met. Indeed, it is *a fortiori* that contempt of court can never be substantially justified and can result in award of attorneys' fees. *E.g.*, *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967), citing *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426–28 (1923); CIT Rule 63 ("A reasonable counsel fee, necessitated by the contempt proceeding, may be included as an item of damage"). Furthermore, the EAJA provision for award of fees "to the same extent that any other party would be liable under the common law" has been interpreted to include bad faith dealings on the part of the government. *Cf. Bonanza Trucking Corp. v. United States*, 11 CIT at 441–42, 664 F. Supp. at 1457–58. The issue then is whether defendant's breach of faith with the judicial process in these actions is the equivalent of bad faith under 28 U.S.C. § 2412(b).

The "bad faith" standard in subsection (b) predates enactment of EAJA, which codified that exception to the long-standing so-called "American rule" of non-award of attorneys' fees to prevailing parties in lawsuits save when the loser has behaved "in bad faith, vexatiously, wantonly, or for oppressive reasons". *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974). These words signify more proof than is required to dispel substantial justification. *See, e.g.*, *Barry v. Bowen*, 825 F.2d 1324, 1334 (9th Cir. 1987) (bad faith standard "higher than the substantial justification standard"); *Lear Siegler, Inc., Energy Prods. Div. v. Lehman*, 842 F.2d 1102, 1117 (9th Cir. 1988):

> * * * An award of attorney fees under the "bad faith" exception is punitive, and the penalty can be imposed "only in exceptional cases and for dominating reasons of justice." *Beaudry Motor Co. v. Abko Properties, Inc.*, 780 F.2d 751, 756 (9th Cir.), *cert. denied*, 479 U.S. 825, 107 S.Ct. 100, 93 L.Ed.2d 51 (1986)(quoting *United States v. Standard Oil Co.*, 603 F.2d 100, 103 (9th Cir. 1979)). The burden is on the plaintiff to show the government's bad faith. *United States v. Ford*, 737 F.2d 1506, 150910 (9th Cir. 1984). An award based on bad faith must be supported by specific findings that are not clearly erroneous or on sufficient evidence appearing in the record. *See Toombs v. Leone*, 777 F.2d 465, 471 (9th Cir. 1985); *Dogherra v. Safeway Stores*, 679 F.2d 1293, 1298 [9th Cir.] 1982). If bad faith is found, a fee award is within the * * * court's discretion.

A court may consider conduct both during and prior to the litigation, although an award may not be based solely on the conduct that led to the substantive claim. *Perales v. Casillas*, 950 F.2d 1066, 1071 (5th Cir. 1992), citing *Sanchez v. Rowe*, 870 F.2d 291, 295 (5th Cir. 1989).

In *Brown v. Sullivan*, 916 F.2d 492, 496 (9th Cir. 1990), for example, the court of appeals reversed a denial of fees under section 2412(b) on the basis of its own review of the "cumulative effect" of the actions taken by the defendant Secretary of the U.S. Department of Health and Human Services in denying disability benefits to an individual claimant. The court equated "bad faith" solely with the

> Appeals Council's failure to review a tape of an ALJ's hearing * * * and other acts that caused delay and necessitated the filing and hearing of additional motions, *viz.*, the Secretary's delay in producing documents and in transcribing the tape.

Id. Similarly, in *Cazares v. Barber*, No. 90–16423, 1992 U.S. App. LEXIS 3807, 1992 WL 43249 (9th Cir. March 11, 1992), the court affirmed an award of attorneys' fees under section 2412(b) based on the "totality of the circumstances, prelitigation and during trial" of a case brought by a pregnant, unmarried high school girl not living with her child's father who had been denied admission to the Honor Society on those grounds. The district court enjoined the holding of any induction ceremony without the plaintiff's participation, whereupon the school called off the ceremony. That act was then equated with bad faith on the part of the government of the United States.

Certainly, much more is and has been at stake in the actions at bar, and it can fairly be said that the cumulative effect of more than ten years of litigation on the merits, as well as of this derivative litigation now underway and causing reliance on principles as old as the nation itself[14], is one of bad faith on the part of the defendant, forestalling further the day when "final" will actually be what the judicial process intends. Perhaps, award of reasonable attorneys' fees and expenses to the plaintiffs under 28 U.S.C. § 2412(b) will aid in realizing the interests of justice in these actions.[15]

V

If the evidence now of record implicated more than the New York Customs Region, the court would require relief directly from the Secretary

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[14] Chiseled into the wall of this Court of International Trade is President Washington's message to the first Supreme Court: "The stability and success of the National Government * * * depend in considerable degree on the interpretation and execution of its laws". In line with this founding maxim, the "mother" lower federal court once stated in a Customs [illegible]

> * * * Revenue laws should be construed, as far as is consistent with carrying into full effect their legitimate purposes and objects, so as to infringe as little as possible on existing private rights and to embarrass as little as possible merchants in the transaction of their business.

United States v. Hutton, 26 F.Cas. 454, 456 (S.D.N.Y. 1879) (No.

[15] The totality of plaintiffs' circumstances entitles them to such an award for this extraordinary proceeding, but they are hereby admonished that any applications therefore will be held strictly to the dictates of CIT Rules 11 and 68. Moreover, the Supreme Court has warned that a request for attorneys' fees should not result in additional major litigation. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). The "party who seeks payment must keep records in sufficient detail that a neutral judge can make a fair evaluation of the time expended, the nature and need for the service, and the reasonable fees to be allowed." *Id.* at 441 (Burger, C.J., concurring). *See generally Bonanza Trucking Corp. v. United States*, 11 CIT at 442–47, 664 F.Supp. at 1458–62, and 11 CIT 489, 669 F.Supp. 430 (1987).

of the Treasury and the Commissioner of Customs of the United States. However, all that seems necessary on the record developed is to direct the Chief of that Region's Residual Liquidation and Protest Branch, who stated under oath that he would now comply with instructions from this court[16], and the defendant and its other officers, employees, agents, servants, sureties and assigns, and they hereby are directed, to reliquidate within thirty (30) days of the date hereof each and every entry listed on the final judgments entered in the 105 actions enumerated above and not previously reliquidated or annotated by the parties as "not stipulable" and which would result in lower duties, with any resulting duty differentials to be paid to the plaintiffs, together with interest thereon as provided by law. At the end of the 30-day period, the defendant shall serve on the plaintiffs and file with the court a written report of its compliance with this opinion and order.

By the conclusion of this extraordinary proceeding, the plaintiffs may file application(s) in conformity with this opinion for award of resultant costs and reasonable attorneys' fees and expenses, together with proper proof of service on the defendant.

To the extent documents covered by the court's order to show cause are still required for purposes of this extraordinary proceeding, the order shall remain in full force and effect.

Except as stated hereinabove, plaintiffs' motion is hereby denied.

(Slip Op. 92–59)

FORMER EMPLOYEES OF KOMATSU DRESSER, PLAINTIFFS *v.* U.S. SECRETARY OF LABOR, DEFENDANT

Court No. 91–08–00559

[Action remanded to Department of Labor.]

(Dated April 24 1992)

Harold Langford, pro se for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *(Vanessa P. Sciarra)*, *Scott Glabman*, U.S. Department of Labor, of counsel, for defendant.

MEMORANDUM AND ORDER

GOLDBERG, *Judge:* In this action, Harold Langford, on behalf of the former employees of Komatsu Dresser Company ["Komatsu"], filed this action appealing a final determination of the Secretary of Labor ["Secretary"] denying certification for trade adjustment assistance benefits

[16] *See* Tr. at 172–73.

pursuant to 19 U.S.C. § 2272 (1988). The court has jurisdiction under 28 U.S.C. § 1581(d)(1) (1988) and 19 U.S.C. § 2395(a) (1988).

Plaintiffs contest the Secretary's determination that the third eligibility criterion of 19 U.S.C. § 2272 was not met because increased imports did not "contribute importantly" to plaintiffs' loss of employment. After reviewing the administrative record and the arguments of the parties, the court concludes that the Secretary's determination is not supported by substantial evidence. Therefore the court remands the case to the U.S. Department of Labor ["Labor"] to (1) further investigate plaintiffs' allegations pursuant to the court's instructions set forth below and (2) reevaluate plaintiffs' eligibility for trade adjustment assistance benefits in light of newly discovered evidence, if any.

Background

On February 22, 1991, Harold Langford petitioned Labor on behalf of former employees of the Galion, Ohio facility of Komatsu for certification of eligibility for trade adjustment assistance benefits. The petition alleged that "[p]arts being shipped in from Japan [by Komatsu], [and Komatsu's] buying [of] other foreign products" caused Komatsu to displace 156 employees between October 1, 1990 and February 7, 1991. Administrative Record (Public) at 2.

On March 4, 1991, Labor initiated an investigation regarding workers at the Galion facility of Komatsu. The Galion facility produced cranes, excavators, planers, graders, rollers and hydraulic cylinders during the period of investigation. Labor investigated the sales and production of these products and determined that sales and production only significantly declined for rollers during the period of investigation.[1] Administrative Record (Public) at 13.

Based on this information, Labor denied plaintiffs' petition for certification of eligibility on April 3, 1991. Administrative Record (Public) at 33. Labor stated that the third criterion of 19 U.S.C. § 2272 (a) was not met. Specifically, the Secretary explained that the customer survey revealed that Komatsu's roller customers did not purchase imported rollers during the period of investigation. Therefore, imports of rollers did not "contribute importantly" to the displacement of the petitioning workers. Notice of this negative final determination was published in the *Federal Register* on July 11, 1991. *See* Negative Determination Regarding Eligibility to Apply for Worker Adjustment Assistance, 56 *Fed. Reg*. 31678 (1991).

On May 30, 1991, Harold Langford sought administrative reconsideration of the Secretary's negative determination. In his letter to Labor, Mr. Langford stated that the petitioning workers had documents which would prove the third eligibility criterion of 19 U.S.C. § 2272 (1988). Mr. Langford attached to his letter purchase orders, packing lists and an inventory control card which revealed that Komatsu imported compo-

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[1] Production of cranes, excavators and planers increased and production of graders declined insignificantly. Sales of cranes, excavators, planers and graders increased or remained the same. Administrative Record (Public) at 13.

nents for construction equipment it produced. Administrative Record (Public) at 38.

The Secretary denied the workers' request for reconsideration, concluding that while Komatsu was indeed consistently importing some components for use in construction equipment production, none of the imported components had previously been produced by the petitioning workers.

Mr. Langford sought judicial review of the Secretary's negative determination by filing a letter on August 6, 1991 at the Office of the Clerk of the United States Court of International Trade. The letter was deemed to constitute a summons and complaint. Labor responded with an answer filed on October 7, 1991. The Clerk of this court accepted a letter from plaintiff dated December 4, 1991 as plaintiffs' motion for judgment upon the agency record. The motion was filed on December 9, 1991.

DISCUSSION

Congress introduced trade adjustment assistance in the Trade Act of 1984, codified at 19 U.S.C. §§ 2271 *et seq*. (1988 & Supp. II 1990) to provide temporary financial assistance for workers who have been partially or totally displaced as a result of increased imports. *Former Employees of Hawkins Oil & Gas, Inc. v. U.S. Secretary of Labor*, 15 CIT ____, Slip Op. 91–115 at 5 (Dec. 23, 1991); *Former Employees of Linden Apparel Corp. v. United States*, 13 CIT 467, 715 F. Supp. 378, 379 (1989). Pursuant to 19 U.S.C. § 2272 (1988), a group of workers may be eligible to apply for adjustment assistance if the Secretary determines, after investigation:

> (1) that a significant number or proportion of the workers in such workers' firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,
>
> (2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and
>
> (3) that increases of imports of articles like or directly competitive with articles produced by such workers' firm or an appropriate subdivision thereof contributed importantly to such total or partial separation, or threat thereof, and to such decline in sales or production.

When reviewing a determination by Labor regarding certification for trade adjustment assistance, the court must uphold Labor's determination if it is supported by substantial evidence and a reasoned analysis, and is in accordance with law. 19 U.S.C. § 2395(b) (1988); *see also Stidham v. U.S. Dept. of Labor*, 11 CIT 548, 551, 669 F. Supp. 432, 435 (1987); *United Steel Workers of America v. Donovan* 10 CIT 147, 150, 632 F. Supp. 17, 20 (1986). The reviewing court may remand the case to the Secretary to further investigate if "good cause [is] shown;" 19 U.S.C. § 2395(b); *see also Hawkins Oil & Gas, Inc.*, Slip Op. 91–115 at 7; and *Linden Apparel Corp.*, 13 CIT at 469, 715 F. Supp. at 381, (citing 19

U.S.C. § 2395(b)); however, it is not the court's function to substitute its own analysis for that of Labor.

Labor has considerable discretion in managing trade adjustment assistance investigations. However where Labor conducts an inadequate investigation by failing to make reasonable inquiry, the court has good cause to remand the case to Labor to take further evidence. *Hawkins Oil & Gas, Inc.*, Slip Op. 91–115 at 7; *Former Employees of Gen. Elec. Corp. v. U.S. Dept. of Labor*, 14 CIT ___, Slip Op. 90–86 at 9, 11 (Sept. 6, 1990); *United Elec. Radio and Machine Workers of America v. Elizabeth Dole, Secretary of Labor*, 14 CIT ___, Slip Op. 90–131 at 26 (Dec. 13, 1990); *Linden Apparel Corp.*, 13 CIT at 469, 715 F. Supp. at 381. In this regard, courts have observed that "because of the *ex parte* nature of the certification process, and the remedial purpose of the trade adjustment assistance program, the Secretary is obliged to conduct his investigation with the utmost regard for the interests of the petitioning workers." *Stidham*, 11 CIT at 551, 669 F. Supp. at 435, *citing Abbott v. Donovan*, 7 CIT 323, 327–28, 588 F. Supp. 1438, 1442 (1984) (*quoting Local 167, International Molders and Allied Workers' Union v. Marshall*, 643 F.2d 26, 31 (1st Cir. 1981)).

In the instant case, the court is not persuaded that the Secretary made reasonable inquiries regarding allegations in the workers' petition that imported *components* "contributed importantly" to the plaintiff workers' displacement. Plaintiff workers in this case claim that Komatsu transferred production of components, formerly performed by plaintiff workers, to foreign producers.[2] In its investigation, Labor first examined whether increased imports of construction equipment, the fully assembled product of Komatsu, had contributed importantly to a decline in sales or production and employment. Labor found that the plaintiff workers did not meet the third eligibility criterion in 19 U.S.C. § 2272 (1988). However, Labor's investigation and determination were misdirected since the Secretary failed to investigate plaintiffs' allegation in the petition that imports of components caused plaintiffs' displacement.

Plaintiffs then requested administrative reconsideration and submitted evidence to Labor demonstrating that Komatsu imported some **components** for use in assembling its construction equipment. Specifically, plaintiffs submitted the following evidence: a packing slip for tandem mounting sleeves and final drive housings ordered from Canada on August 5, 1991; a packing list for sprockets and axle weldments ordered from Brazil on October 18, 1990; an inventory control card for sprockets again ordered from Brazil to be delivered on February 11, 1991; and an invoice for excavator parts to be sent from Japan on January 31, 1991. In addition, plaintiffs urged Labor to contact them during its analysis of

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[2] *In United Electrical, Radio and Machine Workers of America v. Lynn Martin, U.S. Dept. of Labor*, 15 CIT ___, Slip Op. 91–53 at 11–13 (June 27, 1991), Judge Restani recognized that domestic component producers could claim the right to trade adjustment assistance due to competition from imported components if the two component products were like or directly competitive.

their request if more evidence was needed to meet the requirements of the third eligibility criterion in 19 U.S.C. § 2272.

During its examination of plaintiffs' request for administrative reconsideration, the Secretary questioned M.E. Guilfoy, Manager of Human Resources at Komatsu, regarding the evidence of imported components submitted by plaintiffs. Mr. Guilfoy responded on June 26, 1991 and indicated: (1) that tandem mounting sleeves, a component of its motor grader, would be outsourced **in the future**; (2) that the order for final drive housings placed in Canada was merely the result of scheduling difficulties; however, the housings would also be outsourced in the future; (3) that the sprockets ordered from Brazil and the excavator parts ordered from Japan were never manufactured by the company; (4) that the axle weldments would continue to be manufactured by the Galion facility; and (5) that moldboards, a component of their motor grader, would soon be outsourced. Additionally, Mr. Guilfoy indicated that the decisions to outsource the production of certain of the above-named components were made after the Labor's investigation. Administrative Record (Public) at 43.

After receiving this response, the Secretary did not inquire whether tandem mounting sleeves or axle weldments were actually being imported during the investigative period as evidenced by the packing slip and list submitted to Labor by plaintiffs. More importantly, Labor failed to investigate whether Komatsu had increased its reliance on imports of any other components which were formerly produced by the plaintiff workers even though plaintiffs informed Labor that they could obtain information regarding other imported components if necessary to meet the eligibility criteria. There is no evidence in the record that Labor sought any information from plaintiffs.

Labor's investigations of trade adjustment assistance cases are typically limited to questioning the displacing company and surveying its customers. However, the investigation of cases which involve an increased reliance by a company on imports of **components**, which were formerly produced by plaintiff workers, necessarily requires different investigative methods. In the instant case for example, a customer survey is useless since customers of fully assembled construction equipment are unlikely to know whether the individual component parts of their equipment are imported. Here, Labor must resolve which imported components plaintiff's allege to have caused their displacement, and further determine whether their importation "contributed importantly" to the workers' displacement.

Conclusion

After review of the record, the court concludes that Labor conducted an inadequate investigation in this case. Therefore, the court remands the case to the Secretary to investigate whether Komatsu increased its reliance on imports of any components which were previously produced by the petitioning workers. The Secretary is then directed to reevaluate whether petitioners are eligible for assistance pursuant to 19 U.S.C.

§ 2272, in light of any new evidence, and to issue a final determination within 45 days after the date of this opinion. The Secretary shall provide the court, through counsel, a copy of that determination within five days of its issuance.

(Slip Op. 92–60)

SEARS ROEBUCK & CO., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 87–09–00946

Plaintiff challenges Customs' classification of camcorders as a combination article consisting of a television camera and a tape recorder. The Court holds the merchandise does not consist of a television camera and remands this action to Customs for it to determine the classification of the merchandise.

[Remanded.]

(Decided April 27, 1992)

Barnes, Richarson & Colburn (*Donald J. Unger* and *Brian F. Walsh*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Nancy M. Frieden*); *Stephen Berke*, U.S. Customs Service, for defendant.

MEMORANDUM OPINION AND ORDER

DICARLO, *Chief Judge:* Plaintiff challenges Customs' classification of camcorders as a combination article consisting of a television camera and a tape recorder under item 685.49, Schedule 6, of the Tariff Schedules of the United States (TSUS). The merchandise was described in plaintiff's invoices as a "color video sound camera (video camera & recorder)" which was introduced to the United States market in the mid-1980's. Plaintiff claims the merchandise contains neither a television camera nor a tape recorder as those tariff terms were commonly known at the time they were enacted and proposes several alternative classifications. The Court holds that the merchandise does not consist of a television camera and remands the action to Customs for it to determine the classification of the merchandise.

DISCUSSION

"[T]he meaning of tariff terms is a question of law, while the determination whether a particular item fits within that meaning is a question of fact." *E.M. Chemicals v. United States*, 8 Fed. Cir. (T) ____, ____, 920 F.2d 910, 912 (1990). If congressional intent is clearly expressed in the language of a tariff provision, the court should not inquire further into the meaning of that provision. *Brookside Veneers, Ltd. v. United States*, 6 Fed. Cir. (T) 121, 124, 847 F.2d 786, 788, *cert. denied*, 488 U.S. 943

(1988). If a contrary intent is not evident, the court is to construe the term according to its common and commercial meaning. *Id.* at 125, 847 F.2d at 789.

The court is to determine the meaning of a tariff term as of the time of enactment of the provision. *Sears, Roebuck & Co. v. United States*, 46 CCPA 79, 82, C.A.D. 701 (1959). Subsequent definitions may not be used to expand the meaning of a term, but only as an aid to clarifying it. *Id.* In determining the common meaning of a tariff term, the court "may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Brookside Veneers, Ltd.*, 6 Fed. Cir. (T) at 125, 847 F.2d at 789. Since the tariff terms involved in this action were enacted in 1962, *see* Tariff Act of 1962, Pub. Law. 87456, 76 Stat. 72, *reprinted in* 77A Stat. (compiling entire TSUS), "more weight should be given to definitial sources existing closer to that time." *Alexandria Int'l, Inc. v. United States*, 13 CIT 689, 695 (1989).

Defendant argues although the merchandise did not exist when the tariff term for television camera was enacted, the TSUS provision for television camera is an *eo nomine* provision, which in the absence of limitations or a contrary legislative intent, includes all forms of the product. *Tomoegawa USA, Inc. v. United States*, 12 CIT 112, 116, 681 F. Supp. 867, 870, *aff'd in part, vacated and remanded in part*, 7 Fed. Cir. (T) 29, 861 F.2d 1275 (1988). Also, in the absence of contrary legislative intent, tariff terms "'can be expected to encompass merchandise not known to commerce at the time of their enactment' provided the new articles bear an 'essential resemblance' to the article in the statute." *Brookside Veneers, Ltd.* 6 Fed. Cir. (T) at 125, 847 F.2d at 789 (quoting *United States v. Standard Surplus Sales,* 69 CCPA 34, 38, 667 F.2d, 1011, 1014 (1981)). Defendant relies upon several sources published in the 1970's and 1980's for the proposition that a television camera incorporates three essential elements: a lens, pickup device and electronic circuitry. *E.g.,* 13 *McGraw-Hill Encyclopedia of Science and Technology* 541–42 (5th ed. 1982). Defendant claims that since the merchandise contains a lens, a pickup device and electronic circuitry, it bears an essential resemblance to television studio cameras and portable television cameras used in electric news gathering (ENG).

Plaintiff argues that although the merchandise has been described as a video camera/recorder, video and television are not synonymous. In support, plaintiff notes defendant's expert testified that video is a broader term than television. Tr. at 334; *see also id.* at 258–59 (plaintiff's expert testified the meaning of television has been expanded far beyond its original meaning). Plaintiff continues it is possible for an article to contain a video camera component without containing a television camera component. Plaintiff contends the merchandise does not contain a television camera because it is not used in television broadcasting.

Television is defined in *Webster's New International Dictionary of the English Language, Second Edition, Unabridged* (1961), as:

> Vision at a distance; hence, the transmission and reproduction of a view or scene, esp. a view of persons or objects in motion, by any device which converts light rays into electrical waves and reconverts these into visible light rays.

That source defines television camera as:

> The part of a transmitting apparatus in which the image of the scene to be televised is formed for conversion into electrical impulses.

Id. at *Addenda*, cii. Another source available at the time of enactment of the provision defines television camera as:

> That part of the transmitter which consists of a lens and a special cathode-ray tube containing a plate on which the image to be televised is projected for transformation into a flow of electrons.

Webster's New World Dictionary, College Edition (Copyright 1960). A scientific authority available at the time of enactment of the TSUS provides:

> Television Camera The pickup unit used to convert a scene into corresponding electric signals. Optical lenses focus the scene to be televised on the photosensitive surface of the camera tube. This tube breaks down the visual image into small picture elements and converts the light intensity of each element in turn into a corresponding electrical signal. Also called camera and telecamera.

The Electronics and Nucleonics Dictionary (Copyright 1960).

These definitions indicate a television camera converts visual images and sounds into electric signals and is used in connection with television transmission apparatus in transmitting electrical waves over a distance. Defendant's definition that a television camera consists of a lens, pickup device and electronic circuitry is inadequate because it does not include the essential element that television cameras are used in connection with television transmission apparatus. While the merchandise shares three important elements with television cameras, this does not support defendant's position that everything containing those elements is a television camera.

The use of an article is important in determining whether an article is within the scope of an *eo nomine* provision. *United States v. Quon Quon*, Co., 46 CCPA 70, 73, C.A.D. 699 (1959). A witness for plaintiff testified the merchandise is not a television camera because it lacks systems which allow it to be connected to television transmission apparatus. *Id.* at 75–76. Defendant's expert testified that to use the merchandise in connection with television transmission apparatus would be a fugitive use of the merchandise, Tr. at 319, 370–72, and that he did not know of any cases where the merchandise had been so used. Tr. at 319. He also testified that camcorders are not manufactured to send signals to portable transmitters, satellite transmitters or up-link transmitters used in

ENG for television broadcast purposes. Tr. at 322–23. In addition, he testified that the merchandise is not interchangeable with television cameras, such as the studio camera which both experts agreed is a television camera. Tr. at 388. At trial, the Court found that most people buy the merchandise to take the place of and to perform the same functions as home movie cameras. Tr. at 426.

Based upon the testimony of the witnesses, the lexicographic authorities, an examination of the merchandise and its own understanding of the term, the Court finds the merchandise does not consist of a television camera since it is not used in connection with television transmission apparatus. A television camera was used in connection with television transmission apparatus for television broadcasting purposes. The merchandise is used for home recording, and its primary purpose is to make a tape of what appears before the lens. It is used as a substitute for motion picture film cameras.

Conclusion

Since the Court finds that the merchandise does not consist of a television camera, plaintiff has overcome the presumption of correctness attaching to Customs' classification of the merchandise as a combination article consisting of a television camera and a tape recorder. *See* 28 U.S.C. § 2639(a)(1) (1988). The Court remands the action to Customs for it to determine the classification of the merchandise in a manner consistent with this opinion.

(Slip Op. 92–61)

National Hand Tool Corp., plaintiff *v.* United States, et al., defendants

Court No. 89–11–00636

Plaintiff challenges the marking requirement for articles it imported from Taiwan and processed in the United States. The Court finds that there was no change in name, character or use of the articles and, therefore, substantial transformation did not occur in the United States. The articles must be marked to indicate the country of origin pursuant to 19 U.S.C. § 1304.

[Judgment for defendants.]

(Decided April 27, 1992)

Skadden, Arps, Slate, Meagher & Flom (*Rodney O. Thorson*) for plaintiff.

Stuart M. Gerson, Assistant Attorney General, *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, United States Department of Justice (*Barbara M. Epstein*), for defendants.

Memorandum Opinion

DiCarlo, *Chief Judge:* Plaintiff, National Hand Tool Corporation, challenges the denial of its protest concerning the country of origin

marking of the articles it imported from Taiwan. The articles involved are nine kinds of components of mechanics' hand tools which plaintiff further processed and assembled in the United States. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1988). At issue is whether the imported articles underwent substantial transformation in the United States, exempting plaintiff from the country of origin marking requirement under 19 U.S.C. § 1304 (1988). The Court finds that the name, character or use of the merchandise did not change by post-importation processing, and no substantial transformation occurred. Customs properly required the merchandise be marked with its country of origin.

Background

Although the parties agree to what processes were involved, they disagree as to whether the processes amounted to a substantial transformation of the imported articles. By stipulation of the parties and the findings of fact, the processes involved in plaintiff's operation are as follows.

Plaintiff imported hand tool components which it used to produce flex sockets, speeder handles, and flex handles. These tools are used for tightening and loosening nuts and bolts. The components were either cold-formed or hot-forged in Taiwan into their final shape before importation, except for speeder handle bars (Ex. F) which were reshaped by a large power press after importation. The grip components of flex handles (Exs. G & H) were knurled in the United States by turning the grip portion of the handle against a set of machine dies that formed a cross-hatched diamond pattern. This pattern affords a comfortable, safe gripping surface.

Some of the articles (Exs. A, B, F, G & H) were heat-treated in the United States while others (Exs. C & E) underwent heat treatment in Taiwan. The heat treatment is a multi-stage operation in which the articles are heat treated, oil-quenched and tempered. The heat treatment strengthens steel by carburization to meet Federal and American National Standards Institute (ANSI) specifications. The carburization process strengthens the surface of steel by increasing its carbon content. After heat treatment, components are cleaned by sand-blasting, tumbling and/or chemical vibration to prepare their surfaces for electroplating. The cleaning process for some articles was performed in Taiwan while others were cleaned after importation.

Next, the articles were electroplated with nickel and chrome to resist rust and corrosion. Nickel-chrome plating consists of layers of nickel measured in the increments of one ten-thousandth of an inch and chrome measured in the increments of one millionth of an inch. The nickel and chrome do not chemically combine with the alloys of the steel, and, hence, the electroplating process does not change the chemical structure of the steel. Some articles (Exs. A, B, C, F, G & H) were electroplated in the United States while other articles (Exs. D, E & I) were electroplated in Taiwan.

The handle components of flex handles (Exs. G & H) were marked with a trademark and size after the electroplating process.

After the post-importation processing was completed, various components were assembled to produce plaintiff's flex sockets, speeder handles and flex handles. The assembly operations were manual and required some skill and dexterity to put components together with a screw driver. A flex socket (Ex. L1 or L2) was assembled from a tang end of flex socket (Ex. C) and a drive socket (Ex. A or B) with a connecting block, two pins and two tension springs.

A speeder handle (Ex. K) was combined with a spring-loaded ball in an operation called "stagging" or "staking" in which a spring-loaded ball was inserted into the cavity at the end of the handle component (Ex. F), and the cavity was then partially closed. The handle was then assembled with a knurled grip component (Ex. D or I) with one pin and one spring.

A flex handle was assembled from a lug, or "G-head" (Ex. E), and a handle component (Ex. G or H). A spring and a ball were inserted in the lug by a "stagging" operation and assembled with the handle with a threaded fastener screw and a tension spring.

The Court found that pre-importation processing of coldforming and hot-forging required more complicated functions than post-importation processing.

Both parties also presented evidence concerning the value of the articles at the time of importation and the value added in the United States. Three different formulas were suggested as a basis to determine value added after importation. Plaintiff presented data comparing the invoice value of the imported articles with its sales price to customers. Plaintiff also presented the data comparing the material cost and the manufacturing cost in the United States. Defendants presented the witness who compared manufacturing cost of plaintiff with another company in the same industry.

Discussion

The statute requires:

> [E]very article of foreign origin * * * imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article * * * will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

19 U.S.C. § 1304(a) (1988). However, when the imported article is substantially transformed, marking is not required pursuant to 19 C.F.R. § 134.35 (1991), which provides:

> An article used in the United States in manufacture which results in an article having a name, character, or use differing from that of the imported article, will be within the principle of the decision in the case of United States v. Gibson-Thomsen Co., Inc., 27 C.C.P.A. 267 (C.A.D. 98). Under this principle, the manufacturer or processor in the United States who converts or combines the imported article into the different article will be considered the "ulti-

> mate purchaser" of the imported article within the contemplation of [19 U.S.C. § 1304(a)], and the article shall be excepted from marking.

Customs determined that plaintiff's imported articles were not substantially transformed and required individual article be marked to indicate the country of origin. Customs' determination in a marking case is presumptively correct, and the party challenging the determination has the burden of proving otherwise. 28 U.S.C. § 2639(a)(1) (1988).

"To determine whether a substantial transformation of an article has occurred for purpose of ascertaining who is the 'ultimate purchaser' each case must be decided on its own particular facts." *Uniroyal Inc. v. United States*, 3 CIT 220, 224, 542 F. Supp. 1026, 1029, *aff'd*, 1 Fed. Cir. (T) 21, 702 F.2d 1022 (1983). Based on the trial testimony, the Court finds that the name of each article as imported has the same name in the completed tool. For example, when the lug, or "G-head", component of flex handle imported from Taiwan (Ex. E) was shown, plaintiff's witness called it a "G-head." When the government counsel asked the name of the part where the lug component is attached to a completed flex handle (Ex. J), the witness also called it a "G-head."

"Character" is defined as "one of the essentials of structure, form, materials, or function that together make up and usu[ally] distinguish the individual." *Webster's Third New International Dictionary* (1981). Plaintiff urges the Court to find change in character due to the heat treatment which results in a metallurgical change of the surface of the articles. The Court finds that the character of the articles remained unchanged after heat treatment, electroplating and assembly. Here, the form of the components remained the same since each component was either hot-forged or cold-formed into its final shape in Taiwan, except for the speeder handle bars.

Plaintiff's expert witness, a metallurgist, testified in detail about the functions and effects of heat treatment. The heat treatment is necessary to make the components conform to Federal and ANSI specifications. He testified that the strength of the components is not uniform, with only 50% of the components meeting the specifications before the heat treatment. After the heat treatment, all components meet the specifications. The heating process changes the microstructure of the material, but there was no change in the chemical composition of the material. Although the microstructural changes pointed out by plaintiff's witness may amount to the changes in characteristics of the material, they do not change the character of the articles. The Court finds that there was no substantial change in the character of the articles.

The use of the imported articles was predetermined at the time of importation. Each component was intended to be incorporated in a particular finished mechanics' hand tool, except for Exhibit C which has dual use either as a part in a universal joint or a flex socket. For example, Exhibit F was intended to be used as the speeder handle bar and was in fact used as speeder handle bar in the finished tool. There was, there-

fore, no change in use as a result of processing performed in the United States.

The fact that there was only one predetermined use of imported article does not preclude the finding of substantial transformation. *See, e.g., Torrington Co., v. United States*, 3 Fed. Cir. (T) 158, 764 F.2d 1563 (1985). However, the determination of substantial transformation must be based on the totality of the evidence. *See Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 478, 664 F. Supp. 535, 541 (1987); *National Juice Prods. Ass'n v. United States*, 10 CIT 48, 61, 628 F. Supp. 978, 991 (1986). The evidence shows that there was no substantial change in name, character or use. Considering all the evidence, the Court is compelled to find under the circumstances that there was no substantial transformation of the articles imported from Taiwan.

Plaintiff also urges the Court to compare the processing involved in this action with the steel galvanization process which the Court found to be substantial transformation in *Ferrostaal Metals*. The products and processes involved in *Ferrostaal Metals* and the case at bar are totally different. In *Ferrostaal Metals,* the Court examined the imported cold-rolled steel sheet which underwent continuous hot-dip galvanizing process. The Court found that the character of the product transformed a strong, brittle product into a durable, corrosion-resistant product which is formable for a range of commercial applications. 11 CIT at 477, 664 F. Supp. at 540. Furthermore, there were a variety of end uses of the continuous hot-dipped galvanized steel sheet while the cold-rolled steel had very few uses. *Id.* at 477, 664 F. Supp. at 541. In *Ferrostaal Metals*, unlike this case, the Court found there were changes in name, character and use which resulted in substantial transformation. *Id.* at 478, 664 F. Supp. at 541.

Plaintiff also argues that the value added in the United States was relatively significant compared to the operation in Taiwan so that substantial transformation should be found. *See, e.g., National Juice*, 10 CIT at 60, 628 F. Supp. at 990. The Court does not agree. For example, plaintiff urges the Court to compare the invoice purchase price of the imported components with the proportionate value of components in its sales price of finished tools to the customers in the United States. Plaintiff argues that all its costs plus profits should be considered as the value added to the imported product. This could lead to inconsistent marking requirements for importers who perform exactly the same processes on imported merchandise but sell at different prices. To avoid such ludicrous results, the substantial transformation test utilizing name, character and use criteria should generally be determinative of the requirement for country of origin marking. Based on the evidence, the Court holds that there is no reason to find substantial transformation on the basis of the value added in the United States.

Conclusion

Plaintiff's imported articles did not undergo changes in name character or use which resulted in substantial transformation in the United

States. Plaintiff failed to rebut the Customs' presumptively correct determination that the imported article must be marked "Taiwan." Customs' denial of the protest is affirmed, and a judgment shall be entered for defendants dismissing the action.

(Slip Op. 92–62)

GENERRA SPORTSWEAR, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 88–07–00474

MEMORANDUM OPINION AND ORDER

Plaintiff moves to sever certain entries, denominate them as a new action, designate the new action as a test case and suspend 36 other actions thereunder.

Held: Plaintiff's motion for severance, test case designation and suspension is granted.

(Dated April 28, 1992)

Rode & Qualey (*Michael S. O'Rourke*), for plaintiff.

Stuart M. Gerson, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice, (*Saul Davis*) for defendant.

DICARLO, *Chief Judge:* Plaintiff, without objection from the defendant, moves to sever the entries listed on Schedule A from this action, denominate those entries as a new action, Court No. 88–07–00474–S, and, pursuant to USCIT R. 84, designate the new action as a test case and suspend 36 other actions under it. At issue is whether plaintiff has satisfied the criteria for severance, test case designation and suspension. In view of the circumstances presented in this action, the court grants plaintiff's motion to sever, designates the newly severed action as a test case and suspends those actions listed on Schedule B under the test case.

BACKGROUND

Plaintiff challenges the appraisal of various types of wearing apparel imported from China, Bangladesh, Indonesia, Thailand and the Philippines. Plaintiff maintains that the merchandise was purchased by plaintiff from foreign manufacturers through a middleman. The Customs Service appraised the merchandise on the basis of transaction value, as defined in 19 U.S.C. § 1401 a(b), at the price of the middleman's sale, as reflected on the middleman's invoice. Plaintiff claims that the manufacturer's sale price, as shown on the visa, export license or quota document (the visaed invoice), and not the middleman's sale price is the proper basis for the appraisal.

After issue was joined, plaintiff filed its motion for severance, test case designation and suspension. Plaintiff maintains that, given the number of protests (86) and entries (325) involved in this case, severance "will provide the Court and the parties with a representative cross section of factual circumstances in a more manageable form." Plaintiff alleges that the "core legal issue" is "whether or not the middleman sale or the value of an antecedent sale for exportation to the United States represents the proper dutiable value." Plaintiff further alleges that this issue is common to the proposed test case and to all the actions in which suspension is sought. Lastly, plaintiff asserts that severance, test case designation and suspension will "facilitate the orderly disposition and resolution" of the issue.

Discussion

The authority for the test case/suspension procedure is found in USCIT R. 84. Pursuant to Rule 84(b), an action may become a test case "by order of the court upon a motion for test case designation made after issue is joined." The criteria for suspension are set forth in Rule 84(c), which provides:

> An action may be suspended under a test case if the action involves an issue of fact or a question of law which is to be the same as an issue of fact or question of law involved in the test case.

Additionally, the party moving for suspension must provide the court with, *inter alia*, "a concise statement of the issue of fact or question of law alleged to be the same in both actions." USCIT R. 84(d).

Suspension of an action requires the existence of a test case. Although Rule 84 is silent on the definition of a test case, it may be understood to be an action selected out of a number of cases involving the same question. The selected action is intended to proceed first to final determination and to serve as a test of the right to recovery in the other actions. *Cf.* Black's Law Dictionary 1474 (6th ed. 1990); Webster's Third New International Dictionary 2362 (1981). Clearly, the concept of a test case presupposes a relationship to actions for which suspension is sought. Parenthetically, for this reason, Rule 84(b)(2), which permits an action "automatically" to become a test case without any relationship to suspensions, appears to serve no purpose.

For actions involving a common question of law or fact, the test case/suspension procedure is an available alternative to procedures permitting consolidation of actions under USCIT R. 42(a). Both consolidation and the test case/suspension procedures serve to achieve economies of time, effort and expense, and to promote uniformity of decisions. The two procedures, however, differ in several material respects. With consolidation, the various actions with the common question of law or fact are merged into a single consolidated action. Thus, the final decision in the consolidated action has binding legal effect on all of the merged actions. On the other hand, in the test case/suspension procedure, the test case and the suspended actions maintain their separate identities. The

result is that the final decision in the test case is not necessarily legally binding on the suspended actions.

A motion for test case designation should provide the court with information showing that the moving party has other pending actions, the disposition of which will be facilitated if they are suspended pending the decision in the test case. More specifically, the movant should demonstrate that the actions proposed for suspension involve:

a significant and identified issue of fact or question of law in common with the test case;

a threshold issue, (*i.e.*, a potentially dispositive issue) in common with the test case; or

other circumstances in common with the test case showing that a decision in the test case will facilitate the disposition of the other actions.

Mere allegations of sameness or that the actions are related will not suffice. *See Air-Sea Forwarders, Inc. v. United States*, 69 Cust. Ct. 327, 329, C.R.D. 72–24 (1972) ("It is to be added that merely because a case involves the classification of articles under the same provisions of the tariff schedules as a test case does not mean that another case involving the same provisions is *ipso facto* suspensible thereunder.") *See also Teleflora Prods., Inc. v. United States*, 13 CIT 1095 (1989).

The purpose of the test case/suspension procedure is to "facilitate the disposition of actions, eliminating the necessity of trying the same issue over and over again, and dispensing with the filing of complaints and answers in actions which in all likelihood will never be tried." *H. H. Elder & Co. v. United States,* 69 Cust. Ct. 344, 345, C.R.D. 72–28 (1972). Therefore, the court should consider whether "suspension * * * [would] aid in the conclusive determination of a case sought to be suspended thereunder." *F.W. Woolworth Co. v. United States,* 71 Cust. Ct. 272, 274, C.R.D. 73–26 (1973); *see also Teleflora Prods., Inc., supra*, at 1097. "The purpose of suspension is not to create a reservoir of future litigation or to preserve actions for last-minute revivals. Its purpose is to encourage disposition in accordance with the test case." *Intercontinental Fibers, Inc. v. United States*, 2 CIT 133, 135 (1981).

As for severance, since the court's Rules are silent on the requirements for a motion to sever, the matter is one committed to the sound discretion of the court. Among the factors the court considered, in this case, in determining the appropriateness of severance are:

the totality of the facts and circumstances of the case;

whether factual and legal distinctions exist to justify the severance;

the potential prejudice to the opposing party;

whether severance will promote judicial economy through a savings of time and expense to the parties and the court; and

whether severance will promote the interests of justice.

Even when, as here, the parties have agreed to the requested motion, the court has an independent responsibility to exercise its judicial dis-

cretion in considering a motion for severance, test case designation and suspension.

While plaintiff's motion procedurally complied with the requirements of the court's Rules and case law, the court found that it lacked sufficient information to act upon the motion. Accordingly, the court asked the parties to provide the following information:

> Whether the merchandise is identical in the main action (88–04–00474), the proposed severed action, and the actions in which suspension is sought?
>
> Whether the issues of fact and questions of law presented in the proposed suspended actions are common to those in the proposed test case?
>
> Whether any of the proposed suspended actions present issues—jurisdictional or substantive—for judicial determination in addition to the common issue agreed upon by the parties, namely the basis for the appraisal of the imported merchandise?
>
> Why the actions in which suspension is sought should not be consolidated, pursuant to USCIT R. 42(a), with the main action or the proposed severed action?

Additionally, the court, sought information on the question of severance, specifically:

> What issues exist in Court No. 88–07–00474 in addition to the question of whether "the middleman sale or the value of an antecedent sale for exportation to the United States represents the proper dutiable value?"
>
> How will the proposed severance specifically "facilitate the orderly disposition and resolution" of this issue?

In a joint response, the parties stated that the core legal issue of whether the middleman sale or the antecedent foreign manufacturer's sale constitutes the correct dutiable value is "an on-going issue, one which generates protests and summons[es] on a monthly basis." According to their records, 52 actions are pending before the court that involve this issue with over 7500 entries, various manufacturers from nine countries, at least 15 middlemen and hundreds of different styles of wearing apparel.

The parties further assert that the entries subject to the motion to sever pertain to imports from a single country, and thus will permit the court to focus on the core question of law. The parties maintain that the severed entries will give the court a cross–section of the three factual scenarios common to all of the entries, specifically, where the middleman provides no assists; where the middleman provides some assists; and where the middleman provides all assists. Moreover, these entries will provide a representative sample of the factual issue of the visa, export license or quota document (visaed invoice) required for each entry.

The parties claim that severance will reduce unnecessary or repetitive preparation, discovery and litigation. Failure to sever, in their view,

would unduly burden the parties by forcing them to conduct discovery in as many as nine countries, rather than one country. They further contend that denial of plaintiff's motion will leave the court with a more complex and less focused case that would require significantly more time to bring before the court for final disposition.

The court finds that severance is appropriate in these circumstances. The Government will not suffer any prejudice. Severance will provide the parties and the court with a manageable case having a simple fact pattern and a concise statement of the question of law, and will promote a speedy and effective method for the resolution of the issues.

Regarding test case designation and suspension, the parties state that all of the merchandise in the various actions is wearing apparel but of various kinds—men's, boys', women's and girls'—and encompasses hundreds of styles. They maintain that the essential questions of fact and law pervade the main action, the proposed test case and the actions in which suspension is sought. The parties acknowledge that other subsidiary issues may exist, but they are not now identifiable due to the large number of entries.

The parties submit that a decision in the test case will provide direction to the parties and the Customs Service regarding the resolution of the suspended actions. A decision in the test case, in their view, could lead to the disposition of the suspended actions by submissions on agreed statements of fact or voluntary dismissals under the direct supervision of the court. The parties emphasize that consolidation under USCIT R. 42(a) would not serve the administration of justice. They maintain that consolidation will complicate discovery, make trial preparation overly burdensome and strain, the court's judicial resources with a trial of several months duration.

The supplemental response of the parties, in this action, provides the information that is helpful to the court in determining the appropriateness of using the test case/suspension procedure and will assist the court in discharging its responsibility to manage its docket "to provide for the efficient and expeditious termination" of cases. *Men's Wear Int'l, Inc. v. United States*, 13 CIT 817 (1989).

The court finds that the parties have demonstrated that this action is appropriate for test case designation. Moreover, the court concludes that the test case/suspension procedure is warranted in this case because it will provide an orderly mechanism for disposing of the numerous actions that share the common issue with the proposed test case.

The court is persuaded that the parties have demonstrated that the actions in which suspension is sought involve a significant issue of fact and question of law in common with the test case. Moreover, the on-going nature of the core legal issue and the large number of entries involved show that a decision in the test case will facilitate the ultimate resolution of the other actions. These same considerations demonstrate the impracticality of consolidation in these circumstances.

Accordingly, it is hereby

ORDERED that the entries listed on Schedule A attached to this Memorandum Opinion and Order are severed from Court No. 88–07–00474 and are designated as a new action, Court No. 88–07–00474–S, and it is further

ORDERED that Court No. 88–07–00474–S is designated a test case, and it is further

ORDERED that the actions listed on Schedule B attached to this Memorandum Opinion and Order are suspended under Court No. 88–07–00474–S. and it is further

ORDERED that the parties will submit a proposed scheduling order pursuant to USCIT R. 16, within 60 days from the date of this order, that limits the time for submission of the test case for final disposition.

COURT NO. 88–07–00474–S

SCHEDULE A

Court No.	Protest No.	Entry No.
88–07–00474–S	3001–8–000463	320–0216936–8
	3001–8–000463	320–0217024–2
	3001–8–000463	320–0217027–5
	3001–8–000510	320–0217078–8
	3001–8–000519	320–0447927–8
	3001–8–000720	320–0449080–4
	3001–8–000753	320–0449203–2
	3002–8–000069	320–0217089–5
	3001–8–000183	320–0214720–8
	3001–8–000502	320–0216139–9
	3001–8–000572	320–0217019–2
	3001–8–000714	320–0217710–6

SCHEDULE B

Calendar	Plaintiff	Court No.
Joined Issue	Bloomingstep, Inc.	88–07–00471
Joined Issue	Generra Sportswear, Inc.	88–07–00474
Joined Issue	New Issues, Inc.	88–07–00475
Complaint Filed	Generra Sportswear, Inc.	88–09–00723
Complaint Filed	Bloomingstep, Inc.	88–11–00885
Complaint Filed	Generra Sportswear, Inc.	88–11–00886
Complaint Filed	New Issues, Inc.	88–11–00888
Complaint Filed	New Issues, Inc.	89–03–00163
Complaint Filed	Bloomingstep, Inc.	89–03–00164
Complaint Filed	Generra Sportswear, Inc.	89–03–00165
Complaint Filed	Generra Sportswear, Inc.	89–07–00390
Sept. 1989 Reserve	Bloomingstep, Inc.	89–09–00528
Sept. 1989 Reserve	New Issues, Inc.	89–09–00529
Oct. 1989 Reserve	Generra Sportswear, Inc.	89–10–00557
Oct. 1989 Reserve	New Issues, Inc.	89–10–00593
Nov. 1989 Reserve	Bloomingstep, Inc.	89–11–00631
Nov. 1989 Reserve	Generra Sportswear, Inc.	89–11–00632
Jan 1990 Reserve	Generra Sportswear, Inc.	90–01–00034
Jan 1990 Reserve	Bloomingstep, Inc.	90–01–00035
May 1990 Reserve	Generra Sportswear, Inc.	90–05–00236
May 1990 Reserve	Bloomingstep, Inc.	90–05–00237

SCHEDULE B (continued)

Calendar	Plaintiff	Court No.
August 1990 Reserve	Bloomingstep, Inc.	90–08–00444
Oct. 1990 Reserve	Generra Sportswear, Inc.	90–10–00510
Dec. 1990 Reserve	Generra Sportswear, Inc.	90–12–00621
Dec. 1990 Reserve	Bloomingstep, Inc.	90–12–00622
Feb. 1991 Reserve	Bloomingstep, Inc.	91–02–00120
Feb. 1991 Reserve	Generra Sportswear, Inc.	91–02–00121
Feb. 1991 Reserve	New Issues, Inc.	91–02–00122
May 1991 Reserve	New Issues, Inc.	91–05–00392
May 1991 Reserve	Generra Sportswear, Inc.	91–05–00394
May 1991 Reserve	Bloomingstep, Inc.	91–05–00395
Sept. 1991 Reserve	Generra Sportswear, Inc.	91–09–00689
Oct. 1991 Reserve	New Issues, Inc.	91–10–00726
Nov. 1991 Reserve	Generra Sportswear, Inc.	91–11–00823
Nov. 1991 Reserve	Bloomingstep, Inc.	91–11–00824
Nov. 1991 Reserve	New Issues, Inc.	91–11–00839

ABSTRACTED CLASSIFICATION

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED
C92/70 4/22/92 Tsoucalas, J.	General Electric Co.	88-5-00369-S	685.90 6.1%, 5.7% or 5.3%

ON DECISION

HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
709.63 2.2% or 2.1% for Operator Console 710.80 5.6%, 5.2% or 4.9% for Diagnostic Console	Agreed statement of facts	Milwaukee Components and optional units of x-ray computerized tomography

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